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No. 07-1

IN THE

Supreme Court of the United States

RAYMOND E. QUIGLEY,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the District of Columbia Court of Appeals erred in holding—in conflict with decisions of other courts—that evidence of government leniency toward a prosecution witness is not subject to disclosure under *Brady* v. *Maryland*, 373 U.S. 83 (1963), where the government has not entered into an agreement with the witness conditioning leniency on cooperation.

2. Whether the District of Columbia Court of Appeals erred in holding—in conflict with decisions of other courts—that a court may reject an ineffective assistance of counsel claim on the basis of a hypothesized rationale for trial counsel's actions where the record reveals a different actual motivation.

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INTRODUCTION

This case presents an important question—resolved in conflicting ways by the lower courts—regarding the scope of the government's obligation to disclose to a criminal defendant evidence of leniency the government has provided to a prosecution witness. Under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Giglio* v. *United States*, 405 U.S. 150 (1972), due process requires the government to disclose to the defense any material favorable evidence, including evidence that can be used to impeach a prosecution witness. The question raised here is whether the government may withhold evidence that it afforded leniency toward a prosecution witness where the leniency was not *expressly* conditioned on the provision of the testimony.

In this case, the D.C. Court of Appeals held that evidence of leniency afforded by the government to a prosecution witness is not favorable or material under *Brady* absent an *express* agreement between the government and the witness conditioning leniency on cooperation. This rule severely undercuts the safeguards of *Brady* and *Giglio* and gives the government perverse incentives to encourage cooperation by offering tacit assurances that escape disclosure.

Review is warranted because the D.C. Court of Appeals' decision on this important question of federal law conflicts with decisions of this Court, federal courts of appeals, and other state courts of last resort. An express agreement requirement is contrary to precedent of this Court holding that even an informal "understanding" that leniency will be afforded in exchange for testimony must be disclosed under *Brady* if material. *See Giglio*, 405 U.S. at 154-155. It is also contrary to numerous decisions of federal courts of appeals and state courts of last resort that have similarly rejected an express agreement requirement, holding either that *any* leniency afforded a prosecution witness is subject to disclosure or, at a minimum, that leniency is subject to disclosure if it was provided in connection with an *implicit* cooperation agreement.

Review is also appropriate to provide clarity in this important area of the law. Lower courts' *Brady/Giglio* jurisprudence as a general matter is hopelessly confused. Different courts have taken vastly divergent positions regarding the circumstances in which government leniency toward a prosecution witness must be disclosed. As noted above, some courts mandate disclosure of any leniency shown a prosecution witness without regard to whether the government and witness have entered into an agreement conditioning the

leniency on cooperation. Others require disclosure only where there is reason to believe prosecution has entered into at least an implicit agreement with the prosecution witness. Even among those courts that require disclosure of implicit agreements, however, there is substantial disagreement with respect to the type of evidence that must be turned over to the defense.

Finally, this case also warrants review to address a conflict among the lower courts regarding the application of the ineffective assistance of counsel standard of *Strickland* v. *Washington*, 466 U.S. 668 (1984). Unlike decisions of at least two federal courts of appeals, and in tension with *Strickland* itself, the decision of the D.C. Court of Appeals would permit a court to reject an ineffective assistance claim if it can hypothesize an acceptable motivation for counsel's actions even if the hypothetical motivation differs from the actual explanation provided by counsel. Faced with a demonstrably unreasonable explanation from Quigley's trial counsel for his failure to cross-examine a witness who he knew had testified falsely, the D.C. Court of Appeals hypothesized an explanation of its own. The court's willingness to substitute a hypothetical rationale for trial counsel's actual motivation is contrary to precedent and should be rejected.

OPINIONS BELOW

The D.C. Court of Appeals affirmed Quigley's conviction and the denials of his collateral challenges to that conviction in an order published at *Quigley* v. *United States*, 928 A.2d 731 (D.C. 2007). The unpublished Memorandum Opinion and Judgment setting forth the reasoning of the Court of Appeals is contained in the Appendix. App. 1a-18a. The unpublished orders of the Superior Court denying Quigley's collateral

challenges under *Brady* and *Strickland* are also contained in the Appendix. App. 21a-22a, 43a-50a.

JURISDICTION

The judgment of the D.C. Court of Appeals was entered on July 5, 2007. App. 1a. The Court of Appeals denied Quigley's timely request for rehearing and rehearing en banc on February 19, 2008. App. 19a-20a. On April 29, 2008, the time for filing this petition was extended to June 18, 2008. This Court has jurisdiction to review the final judgment of the D.C. Court of Appeals rejecting Quigley's federal constitutional claims under *Brady* and *Strickland* pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall ... be deprived of life, liberty, or property without due process of law[.]" The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

Background Legal Principles

1. In *Brady* v. *Maryland*, the Court held that "the suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). Favorable evidence includes any evidence that could be used to impeach a prosecution witness. As the Court has observed, "[t]he jury's estimate of the truthfulness and reliability of a given

witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue* v. *Illinois*, 360 U.S. 264, 269-270 (1959).

Thus, in *Giglio*, the Court held that the government violated due process when it failed to disclose to the defendant that it had promised an important prosecution witness that he would not be prosecuted if he cooperated with the government. 405 U.S. at 153-155. The Court explained that the credibility of the witness was "an important issue in the case, and evidence of any understanding or agreement as to future prosecution would be relevant to his credibility and the jury was entitled to know of it." *Id.* at 155.

In *United States* v. *Bagley*, 473 U.S. 667 (1985), the Court reaffirmed that "[i]mpeachment evidence ... as well as exculpatory evidence[] falls within the *Brady* rule." *Id.* at 676. "Such evidence is evidence favorable to the accused, ... so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." *Id.* (internal quotation marks and citation omitted). Favorable evidence includes any "evidence that the defense might ... use[] to impeach the Government's witnesses by showing bias or interest." *Id.*

Under *Brady* and its progeny, "favorable evidence is *material*, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles* v. *Whitley*, 514 U.S. 419, 433-434 (1995) (quoting *Bagley*, 473 U.S. at 682 (plurality)) (emphasis added). "The question is not whether the

defendant would more likely than not have received a different verdict with the evidence," but whether the suppression "'undermines confidence in the outcome of the trial.'" *Kyles*, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678).

2. The Sixth Amendment to the U.S. Constitution guarantees criminal defendants the right to effective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, "the defendant must show that counsel's representation fell below an objective standard of reasonableness" as measured by "prevailing professional norms." *Strickland* v. *Washington*, 466 U.S. 668, 688 (1984). The defendant must also demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

The Facts of This Case

On November 1, 2002, Quigley was convicted in the D.C. Superior Court of first-degree murder while armed and other crimes in connection with the November 30, 2001 shooting death of Kimothy Wilson. Quigley was sentenced to 70 years in prison.

The government's case rested principally on the testimony of four individuals who claimed to have observed portions of the events at issue late on November 29, 2001 and early on November 30, 2001. None of the four was able to provide a complete account of the events, and each witness's testimony was in many respects highly suspect. The most complete account was from a man named Milton Robinson, who was the only

witness who claimed to have seen Quigley actually shoot Wilson.

Robinson testified that on the night of the shooting he saw Wilson and another man, Lawrence Dyson, on the porch of Robinson's apartment building arguing with Quigley about entering the building. Trial Tr. vol. I, 213:12-214:21, 215:20-216:5 (Oct. 28, 2002). Contrary to Dyson's testimony (Trial Tr. vol. II, 333:6-334:3, 335:4-5 (Oct. 29, 2002)), Robinson claimed not to have been involved in the argument (Trial Tr. vol. I, 215:20-216:2, 224:25-225:17). Robinson testified that after the argument Dyson and Wilson left the porch and Quigley followed them and pulled out a gun. *Id.* 216:9-217:3. Robinson said that Quigley shot Wilson and then chased Dyson down the street shooting at him. *Id.* 216:18-218:7.

Robinson testified that on the night of the shooting he told the police that he had no knowledge of the incident. *Id.* 243:15-24. But when the police brought him in for questioning on December 6, 2001, Robinson gave a statement in which he identified Quigley as the shooter. *Id.* 244:18-245:10, 246:14-247:11. In that statement—unlike in his later trial testimony—Robinson indicated that Quigley shot Wilson and Dyson after Dyson threatened Quigley and "went to his car as if he was getting a gun." C.A. App. 185.

On cross-examination at trial, Robinson admitted that he had been convicted of a number of drug-related and other offenses. One of those convictions was for distributing heroin on December 8, 2001, a mere eight days after the shooting, at the scene of the shooting. Trial Tr. vol. II, 284:5-285:7, 303:6-9, 310:1-311:2. That conviction, it turns out, was part of an undisclosed plea

agreement with the government that is at the heart of this appeal.

After Quigley's trial, the government conceded that it had failed to disclose to the defense a plea agreement it had entered into with Robinson on April 11, 2002—after Robinson's grand jury testimony against Quigley on January 10, 2002, but before Quigley's trial in October and November 2002. C.A. App. 171. Pursuant to that undisclosed agreement, Robinson pled guilty to the December 8, 2001 heroin distribution offense as well as a later violation of the Bail Reform Act. *Id.* Although the distribution charge carried a possible sentence of 30 years in prison, Robinson was sentenced to a mere five months of jail time on that offense. *See id.* 252, 268; D.C. Code § 48-904.01(a)(2)(A). He was sentenced to only one month of jail time on the Bail Reform Act charge, which carried a maximum sentence of up to five years. *See* C.A. App. 271; D.C. Code § 23-1327(a). Additionally, as part of the plea agreement, the government:

- Withdrew sentencing enhancement papers that would have doubled the 30-year maximum authorized term of imprisonment on the heroin distribution charge to which Robinson pled guilty, *see* D.C. Code § 48-904.08(a);
- Dismissed a separate charge against Robinson for possession of heroin with intent to distribute on another occasion, which carried a maximum sentence of 30 years, *see id.* § 48-904.01(a)(2)(A);[1] and

[1] The government disclosed the dismissal of the possession with intent to distribute charge but did not disclose that the dismissal was in connection with a plea agreement. C.A. App. 183.

- Declined to charge Robinson with contempt for violating a court order.[2]

As explained below, whether the government recommended that Robinson receive his light 5-month sentence on the heroin distribution charge because of his cooperation with the Quigley prosecution is currently unknown to Quigley. Also unknown are the circumstances under which Robinson reached his plea agreement with the government.

Because the government failed to disclose the Robinson plea agreement, counsel for Quigley was unable at trial to impeach Robinson's testimony—including Robinson's omission of the threat by Dyson—by inquiring about the leniency Robinson received from the government. The inability of Quigley's counsel to cross-examine Robinson on this subject was highly significant because Robinson was a crucial government witness and the other evidence against Quigley was weak.

Lawrence Dyson purported to identify Quigley as the shooter, but could not do so with certainty. Dyson claimed that while walking away from an argument with Quigley and Robinson outside Robinson's building he heard the sound of a gun being cocked and turned around and saw Quigley stand up. Trial Tr. vol. II, 341:17-342:5, 364:21-365:7. Dyson admits he did not see Quigley holding a gun, but he claims to have seen Quigley move his hands. *Id.* 365:6-13. While running from the scene, Dyson heard several shots coming from the direction of Robinson and Quigley but did not look back to see who was firing. *Id.* 342:17-343:1. Dyson confirmed that "he didn't actually see anyone shoot

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[2] *See* C.A. App. 171.

anyone" and that he never saw Quigley with a gun. *Id.* 363:21-22, 364:25-365:13.

Another purported witness, Sharon Dyson, testified that she heard gunshots and looked out her front window toward Robinson's building. Trial Tr. vol. II, 409:20-410:25. Ms. Dyson claimed she was able to see someone running in the opposite direction of her apartment and another person firing a pistol after him. *Id.* 411:1-20. Although she was more than 120 feet away from the shooter (Trial Tr. vol. III, 640:21-642:11 (Oct. 30, 2002)), Ms. Dyson testified that she "would have to say it was Mr. Quigley" based on his build and clothing (Trial Tr. vol. II, 412:5-12). She had not recognized, however, that it was her own nephew, Lawrence Dyson, running away from the shooter. *Id.* 416:1-6. Ms. Dyson did not see the shooting of Wilson. On cross-examination, Ms. Dyson admitted that she had not seen the shooter's face. *Id.* 435:9-12.

The final witness, Sheril Taylor, indicated that upon hearing gunshots, she looked out her window and saw Quigley with a gun running after another man. Trial Tr. vol. II, 444:17-22, 449:12-17, 450:15-452:4, 453:10-24. Taylor did not testify that she saw the shooting of Wilson. On cross-examination, Taylor was confronted with prior inconsistent statements about what she had witnessed that she had given to the investigating officers, the grand jury, and an investigator for Quigley. *Id.* 462:3-15, 465:3-13, 467:20-468:22, 469:2-470:4, 470:13-24. Taylor also conceded that she had smoked crack cocaine about two hours before the shooting (*id.* 457:15-458:21), acknowledged that she had previously been convicted of possession of PCP and first-degree fraud, and admitted to having used crack the morning before testifying at trial (*id.* 473:6-10, 475:7-18).

Significantly, however, Taylor testified that Quigley was her cousin. *Id.* 445:14-18. After Taylor indicated that she and Quigley were cousins, the following exchange occurred:

> THE COURT: How—excuse me, how is he your cousin?
>
> THE WITNESS: Through my mother.
>
> THE COURT: Can you explain how he is your cousin?
>
> THE WITNESS: They are half sisters.
>
> THE COURT: Your mother and who?
>
> THE WITNESS: His mother.

Id. 445:25-446:6. In its opening statement and closing argument, the government asserted no less than 21 times that Taylor was Quigley's cousin. Trial Tr. vol. I, 171:7-182:9; Trial Tr. vol. III, 692:7-715:25, 727:15-740:9; *see, e.g.*, *id.* 703:25-704:2 ("Let's move to Sheril Taylor. That's a tough thing to do. That's something that we don't wish on anyone, to come in and tell a jury you saw your cousin shooting."); *id.* 731:12-13 ("Why on earth would Sheril Taylor wrongfully accuse her cousin, Raymond Quigley, of murder?").

The government also attempted to link Quigley to what it contended was the gun that killed Wilson by introducing evidence that a gun used to fire three shell casings and bullets discovered in front of a house neighboring the location of the November 30, 2001 shooting was found in the back porch of an apartment—two rooms away from where Quigley was sleeping. An occupant of the apartment conceded that the apartment had been used as a "crack bin" and that it was not uncommon for it to be used by strangers. Trial Tr. vol. II,

500:25-501:13, 503:7-12. Fingerprints on the gun were submitted for testing but did not match Quigley's. Trial Tr. vol. III, 661:3-6.

Proceedings Below

1. After his sentencing, Quigley filed a motion under D.C. Code § 23-110 seeking to vacate his conviction principally on the basis of ineffective assistance of counsel. Among other things, Quigley alleged that his counsel performed deficiently by failing to challenge Ms. Taylor's testimony that she and Quigley are cousins when, in fact, they are not related and counsel knew that they are not related. C.A. App. 25-28.

In an April 23, 2004 order, the Superior Court denied Quigley's motion without a hearing and without explanation, referring simply to "the reasons stated in the government's opposition ... and its reply." App. 22a. The government had submitted an affidavit from Quigley's trial counsel purporting to explain his actions. *See* App. 39a-42a. In the affidavit, counsel stated that he did not correct Taylor's assertion that she and Quigley were cousins because after she testified that they were cousins, the prosecutor supposedly "solicited that she was not a biological cousin to Mr. Quigley." App. 42a. Counsel claimed that as a result he "saw no need to explore this further on cross." *Id.*

On May 27, 2005, Quigley filed a second § 23-110 motion, which sought to vacate his conviction, in part, on the ground that the government violated his due process rights under *Brady* and *Giglio*. Quigley's motion was based on the government's failure to disclose leniency it afforded Robinson during the time he was cooperating with the prosecution, including the April 11, 2002 plea agreement with Robinson. C.A. App. 145,

149-160. Noting that evidence from other sources—including hearing transcripts of Robinson's sentencing, Robinson's lawyer, and Robinson himself—were unavailable to him, Quigley sought leave to seek discovery from the government and requested that the Superior Court hold an evidentiary hearing. *Id.* 145. Such a hearing (presumptively required under D.C. law) was necessary to determine the scope of the leniency afforded Robinson and the circumstances surrounding his plea agreement with the government.

In an order dated September 27, 2005, the Superior Court denied Quigley's motion without holding an evidentiary hearing. App. 43a-50a. The court concluded that the undisclosed plea agreement with Robinson was not favorable evidence under *Brady* because there was "no evidence that Mr. Robinson received a benefit concerning the resolution of his own criminal cases in exchange for his testimony against" Quigley. App. 46a.

2. Quigley appealed his conviction and the denials of his § 23-110 motions. The appeals were consolidated, and on July 5, 2007, the D.C. Court of Appeals issued an unpublished memorandum opinion and order rejecting all of Quigley's claims. App. 1a-18a.

On appeal, the government did not contest that evidence of the undisclosed plea agreement with Robinson was favorable under *Brady* and argued instead only that the agreement was not material. Br. of Appellee 18. Nonetheless, the Court of Appeals concluded that the evidence of the agreement was neither favorable nor material, citing principally the supposed lack of evidence that Robinson was promised leniency in exchange for cooperation and the timing of the agreement. App. 8a-10a. As explained below, the Court of

Appeals reached this conclusion even though in critical respects the record was totally undeveloped.

The Court of Appeals also rejected Quigley's claim that his trial counsel provided ineffective assistance by failing to cross-examine Sheril Taylor regarding her false testimony that she is Quigley's biological cousin. Relying on the affidavit from Quigley's trial counsel, the Court of Appeals asserted that counsel had "explained that he chose not to delve into this relationship because Ms. Taylor clarified at trial that she and appellant were not biological cousins, *but instead that her mother and appellant's mother were half-sisters*." App. 13a (emphasis added). The italicized words, however, did not actually appear in counsel's affidavit. App. 42a. The Court of Appeals also concluded that even if counsel's performance were deficient, it was not prejudicial because whether or not Taylor and Quigley were cousins, they had a "close relationship." App. 13a.

On August 16, 2007, Quigley timely filed a petition for rehearing and rehearing en banc. The Court of Appeals called for an opposition by the government but then declined to grant rehearing, denying Quigley's petition without explanation on February 19, 2008. App. 19a-20a.

REASONS FOR GRANTING THE WRIT

I. THE D.C. COURT OF APPEALS' EXPRESS AGREEMENT REQUIREMENT UNDER *BRADY* CONFLICTS WITH DECISIONS OF THIS COURT, FEDERAL COURTS OF APPEALS, AND OTHER STATE COURTS OF LAST RESORT

A. The D.C. Court Of Appeals Held That Evidence Of Government Leniency Is Not Subject To Disclosure Under *Brady* Absent An Express Cooperation Agreement

The D.C. Court of Appeals rejected Quigley's *Brady* claim based on what it believed was evidence that Robinson "had not been *promised* anything by the government in exchange for his testimony" against Quigley. App. 9a (emphasis added). The Court of Appeals relied on grand jury testimony from Robinson indicating that he had not "been *promised* anything or given any benefits to get [him] to testify before the Grand Jury" and an affidavit from one of the lawyers prosecuting Quigley indicating that "neither she, nor the other prosecutor in the case, ever made any *promises* to Robinson regarding the disposition of his own criminal case in connection with his testimony and cooperation in the prosecution" of Quigley. App. 9a-10a (emphasis added).[3] The Court of Appeals also gave

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[3] Robinson also testified before the grand jury in the Quigley case that he had not discussed the criminal case pending against him with the government lawyer who was examining him. App. 9a. This testimony, however, does not address the possibility that Robinson had discussions regarding the case against him with the lawyers prosecuting him in that case. The affidavit from the lawyer prosecuting Quigley similarly made no reference to the lawyers prosecuting Robinson. *Id.* In any event, Quigley was entitled to an evidentiary hearing in order to challenge any inference that might be drawn from the Robinson testimony. Finally, even if Robinson's testimony could somehow be read definitively to fore-

"deference to the trial court's considerations" (App. 10a), including its determination that Quigley had not demonstrated "any explicit promise, agreement, or statement to show that the government dismissed Mr. Robinson's [criminal charges] in exchange for his testimony" against Quigley (App. 47a).

Although the Court of Appeals purported to consider the totality of the circumstances, because the factual record before it was undeveloped, the court necessarily gave undue weight to the absence of an express cooperation agreement. As noted above, the government afforded substantial leniency to Robinson in the undisclosed plea agreement. The government: withdrew sentencing enhancement papers that would have doubled the maximum authorized term of imprisonment on Robinson's heroin distribution charge; dismissed a charge for possession of heroin with intent to distribute, which carried a maximum sentence of 30 years; and declined to charge Robinson with contempt for violating a court order. But this likely was not the extent of the government's favorable treatment of Robinson.

On May 30, 2002, Robinson was sentenced on the charges of heroin distribution and violation of the Bail Reform Act to which he pled guilty. The position taken by the government at that sentencing is unknown to Quigley.[4] Throughout this litigation, the government

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close the possibility that he reached an implicit understanding with the government, the D.C. Court of Appeals' reliance on that conclusion still conflicts with decisions from other courts holding that evidence of leniency is subject to disclosure absent any kind of agreement. *See infra* p. 22.

[4] Due to an apparent equipment malfunction, the transcript of the hearing is unavailable (*see* C.A. App. 145), and the court files

has never confirmed that it sought leniency for Robinson at his sentencing hearing. But the sentences Robinson received—5 months of prison time on the heroin distribution charge that carried a possible sentence of 30 years and 1 month on the Bail Reform Act charge with a five-year maximum—provide reason to believe the government did just that.

The record also does not reveal the circumstances surrounding Robinson's plea agreement with the government. The Superior Court concluded that the government had not expressly promised leniency to Robinson in exchange for his testimony against Quigley. App. 46a-47a. But the Superior Court refused to hold the evidentiary hearing necessary to develop an adequate record to determine whether Robinson and the government reached an *implicit* understanding of some kind. The evidence relied upon by the Superior Court does not indicate whether Robinson told the government he wanted leniency in exchange for his testimony or expected leniency. The evidence also does not indicate whether the government told Robinson that although it could make no "promises," his testimony against Quigley likely would help him.

Without knowing the scope of leniency afforded Robinson or whether Robinson and the government reached an implicit understanding regarding leniency, the D.C. Court of Appeals could reject Quigley's claim only by holding that an *express* cooperation agreement is required under *Brady*.

In rejecting Quigley's *Brady* claim, the Court of Appeals also noted the timing of Robinson's undisclosed

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for the relevant cases also do not reveal the position of the government.

plea agreement: Robinson first identified Quigley before he was arrested for the crime that was the subject of the plea agreement, and Robinson was sentenced five months before Quigley's trial. App. 8a-9a. But this was not an independent basis for the court's decision. As noted above, Robinson's testimony against Quigley at trial omitted an important assertion contained in Robinson's initial statement to the police—that Dyson had threatened Quigley and gone "to his car as if he was getting a gun." C.A. App. 185. Robinson's desire for leniency could explain that discrepancy in favor of the prosecution. The timing of Robinson's identification of Quigley is irrelevant to this aspect of Quigley's *Brady* claim. Moreover, the fact that Robinson testified at trial *after* his sentencing does not help the government. The defense was entitled to inquire into benefits afforded to Robinson that could have influenced his testimony. In any event, at trial, Robinson simply repeated his grand jury testimony, which had been given while the charges against him were still pending. Finally, at the time Robinson testified at Quigley's trial, he was facing a parole revocation hearing scheduled for after the trial. *See* Br. of Appellee 21 n.21.

B. An Express Agreement Requirement Is Contrary To Precedent Of This Court

The Court of Appeals' conclusion that evidence of leniency toward a prosecution witness is not *Brady* material absent an *express* cooperation agreement is contrary to this Court's precedent. In *Giglio*, this Court held that the government was required under *Brady* to disclose "evidence of *any understanding* or agreement as to future prosecution" of a government witness. 405 U.S. at 155 (emphasis added). The term "understand-

ing," when contrasted with the word "agreement," readily embraces the type of tacit meeting of the minds that Quigley contends may have occurred here. If "understanding" simply meant "agreement," there would have been no need to list it separately.

In fact, the Court in *Giglio* suggested that evidence of an assurance to a prosecution witness much less definite than a promise of immunity could constitute *Brady* material. Although there was a factual dispute in *Giglio* regarding whether the prosecution witness was promised immunity, it was undisputed that a prosecutor had told the witness that he "would definitely be prosecuted if he did not testify and that if he did testify he would be obliged to rely on the 'good judgment and conscience of the Government' as to whether he would be prosecuted." 405 U.S. at 153. The Court noted that the affidavit of the prosecutor who made this assurance "standing alone, contains at least an implication that the Government would reward the cooperation of the witness, and hence tends to confirm rather than refute the existence of some understanding for leniency." *Id.* at 153 n.4.

The narrow construction of *Brady* adopted by the D.C. Court of Appeals is also contrary to the rationale of *Giglio*. Lenient treatment of a prosecution witness by the government during a period in which the witness is cooperating with the prosecution is relevant to potential witness bias and therefore is favorable even if it is not the product of an express cooperation agreement.

In *Bagley* a plurality of the Court indicated that a "promise or binding contract" affording benefits to a prosecution witness is not required to trigger *Brady* obligations. *See* 473 U.S. at 683-684 (plurality). The

government in *Bagley* failed to disclose that two prosecution witnesses entered into agreements with the government that provided for the payment of a monetary award upon "the accomplishment of the objective sought to be obtained ... to the satisfaction of [the Government]." *Id.* at 683 (alterations in original, internal quotation marks omitted). Even though the agreements were not signed by the government until after the trial and were contingent upon the government's satisfaction, they nonetheless constituted *Brady* material. *Id.* at 683-684. The plurality explained: "The fact that the stake was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction." *Id.* (plurality).

Accordingly, both *Giglio* and *Bagley* reject the express cooperation agreement requirement adopted by the D.C. Court of Appeals. For this reason alone, the Court should grant this petition, vacate the decision of the D.C. Court of Appeals, and remand this case for the evidentiary hearing necessary to determine whether Robinson's undisclosed plea agreement was material under *Brady*.

C. An Express Agreement Requirement Also Conflicts With Decisions Of Federal Courts Of Appeals And State Courts Of Last Resort

An express agreement requirement also has been rejected by numerous federal courts of appeals and state courts of last resort.

1. A number of courts have made clear that evidence of government leniency to a prosecution witness is subject to disclosure under *Brady* regardless of

whether there is *any* kind of agreement—express or implied—between the government and the witness.

In *Reutter* v. *Solem*, 888 F.2d 578 (8th Cir. 1989), the Court of Appeals for the Eighth Circuit held that the government's failure to disclose the fact that the key prosecution witness was eligible to have his sentence commuted and that the commutation hearing had been rescheduled until shortly after his testimony at trial warranted reversal of the conviction. The court specifically stated:

> Our conclusion does not depend on a finding of either an express or an implied agreement between [the prosecution witness] and the prosecution regarding the prosecution's favorable recommendation to the parole board .... The fact that there was no agreement ... is not determinative of whether the prosecution's actions constituted a *Brady* violation requiring reversal under the *Bagley* standard.

Id. at 582.

Similarly, in *Benn* v. *Lambert*, 283 F.3d 1040 (9th Cir. 2002), the Court of Appeals for the Ninth Circuit found a *Brady* violation where the government suppressed evidence that the prosecution had arranged for one of its witnesses to be released without being charged after he was arrested on outstanding warrants, had burglary charges against the witness dismissed, and arranged for an arrest warrant for a parole violation to be delayed. *Id.* at 1057. The Court of Appeals gave no indication that this lenient treatment was provided pursuant to a cooperation agreement, yet it nonetheless concluded that the evidence was favorable and material. *Id.* at 1057-1058; *see also Hovey* v. *Ayers*, 458

F.3d 892, 918 (9th Cir. 2006) (evidence of leniency before testimony favorable even absent agreement).

Additionally, at least one state court of last resort has held that a cooperation agreement is not required under *Brady*. In *State* v. *Floyd*, the Supreme Court of Connecticut concluded that evidence that the state had not opposed a cooperating witness's request for a bond reduction and had opted not to prosecute the same witness for a probation violation was favorable (though ultimately not material) even though there was no agreement—express or implied—between the government and the witness. 756 A.2d 799, 822-823, 827 (Conn. 2000).

Because the Courts of Appeals for the Eighth and Ninth Circuits and the Supreme Court of Connecticut do not require an agreement of any kind—express or implicit—in order for evidence of leniency to be subject to disclosure under *Brady*, the D.C. Court of Appeals' decision in this case creates a split of authority no matter how it is interpreted. Even if the D.C. Court of Appeals' decision were somehow read to rest on the conclusion that Robinson and the government entered into no cooperation agreement of any kind—express or implicit—it would still conflict with the decisions described above.

2. Moreover, several federal courts of appeals and state courts of last resort have concluded that facts indicating that the government and a prosecution witness entered into an *implicit* cooperation agreement can be subject to disclosure under *Brady*.

In *United States* v. *Risha*, 445 F.3d 298 (3d Cir. 2006), the government made no express promises of leniency to a prosecution witness facing state criminal charges, but the state prosecutor told the witness that

cooperation "would be taken into consideration." *Id.* at 300-301 (internal quotation marks omitted). In ruling that nondisclosure of this assurance could constitute a *Brady* violation (if the knowledge of the assurance were attributable to the federal government), the Court of Appeals for the Third Circuit held that there could "be no dispute that the information in question [wa]s favorable to the defense because [the prosecution witness's] expectation of leniency in the state proceedings could have been used to impeach him." *Id.* at 303 n.5.

In *Monroe* v. *Angelone*, 323 F.3d 286 (4th Cir. 2003), the Court of Appeals for the Fourth Circuit held that evidence that the government had assisted a prosecution witness in obtaining a sentence reduction was favorable despite the absence of an express cooperation agreement. *See id.* at 300-301 & n.23. At most, the case involved some kind of implied agreement. A state police officer had admitted that the witness was looking for consideration and the government had made clear that her help "would not hurt her." *Id.* at 301 n.23 (internal quotation marks omitted).

In a recently issued en banc opinion, the Court of Appeals for the Sixth Circuit also held that an implicit cooperation agreement can be subject to disclosure under *Brady*. In *Bell* v. *Bell*, 512 F.3d 223 (6th Cir. 2008), the court held that a prosecutor's notes indicating that a prosecution witness sought lenient treatment in exchange for his testimony were subject to disclosure under *Brady* if material. *See id.* at 232-233. The court also held:

> It is well established that an express agreement between the prosecution and a witness is possible impeachment material that must be

> turned over under *Brady*. The existence of a less formal, unwritten or tacit agreement is also subject to *Brady's* disclosure mandate.

Id. at 233 (internal citation omitted). Thus, the court concluded that "a mutual understanding, albeit unspoken" that the witness "would provide testimony in exchange for the district attorney's intervention in the case against him ... would qualify as favorable impeachment material under *Brady*." *Id.*[5]

The Court of Appeals for the Seventh Circuit similarly has concluded that evidence revealing merely a "tacit understanding" between the government and a prosecution witness is subject to disclosure under *Brady*. In *Wisehart* v. *Davis*, 408 F.3d 321 (7th Cir. 2005), the court described various circumstances that would give rise to disclosure obligations under *Brady*:

> Or there might have been a tacit understanding that if [a prosecution witness's] testimony was helpful to the prosecution, the state would give him a break on some pending criminal charge. ... Express or tacit, either way there would be an agreement, it would be usable for impeachment, and it would have to be disclosed to the defense.

Id. at 323-324 (internal citation omitted).

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[5] A petition for a writ of certiorari in *Bell* v. *Bell* (No. 07-1506) was filed in this Court on June 2, 2008. Although the primary focus of that petition is on whether the government can decline to disclose favorable evidence that is "publicly available," the case may also afford the Court an opportunity to consider the circumstances under which facts supporting an inference that an implicit cooperation agreement was reached are subject to disclosure under *Brady*.

The Court of Appeals for the Ninth Circuit has also required disclosure of facts revealing an implicit cooperation agreement. In *United States* v. *Shaffer*, 789 F.2d 682 (9th Cir. 1986), the government failed to disclose to the defense the fact that a key prosecution witness had "assets which were acquired through drug profiteering." *Id.* at 689. This fact, "coupled with the government's failure to initiate asset forfeiture proceedings to acquire these assets, implies that a tacit agreement was reached between [the prosecution witness] and the government that allowed [the witness] to avoid any asset forfeiture liability in exchange for his cooperation." *Id.* Accordingly, the court found that the government had violated *Brady* by failing to disclose the facts revealing this tacit agreement. The court specifically rejected an express agreement requirement:

> The government contends that, because there was no *explicit* agreement on this matter, it had nothing to disclose. ... While it is clear that an explicit agreement would have to be disclosed because of its effect on [the witness's] credibility, it is equally clear that *facts which imply an agreement* would also bear on [the witness's] credibility and would have to be disclosed.

Id. at 690 (internal citations omitted, emphasis added). The court again rejected an express agreement requirement in *Hovey* v. *Ayers*:

> Evidence of a deal or promise of lenient treatment in exchange for a witness's testimony against a defendant may constitute evidence that must be disclosed under *Brady* and *Napue*. The deal or promise *need not be express*; failure to disclose an agreement or

> guarantee of leniency indicated without making a bald promise also may violate *Brady*.

458 F.3d at 916-917 (internal citation and quotation marks omitted, emphasis added).

Finally, at least one state court of last resort has held that evidence of an informal understanding that a witness's cooperation will result in lenient treatment is subject to disclosure under *Brady*. In *Jimenez* v. *State*, 918 P.2d 687 (Nev. 1996), the Nevada Supreme Court followed the Court of Appeals' decision in *United States* v. *Shaffer* and concluded that "the prosecution's duty to disclose exculpatory or impeachment evidence is not limited to situations where the State admits that it made a deal with an informant specific to the case at hand." *Id.* at 694-695. Although there was no express agreement between the government and the witness at issue, the court concluded that evidence that the witness was an informant and had received benefits from the state, including dismissal of charges, was favorable and material under *Brady*. *Id.*

II. The Scope Of The Government's Obligation To Disclose Leniency Toward A Prosecution Witness Is A Question Of Fundamental Importance That Should Be Decided By This Court

A. Requiring An Express Agreement Invites Unfairness And Abuse

The D.C. Court of Appeals' narrow construction of *Brady* raises serious practical concerns warranting review by this Court. As an initial matter, the motivations of prosecution witnesses to color testimony are just as great, if not greater, when there is an *implicit* understanding between the government and the witness that leniency will be exchanged for testimony. As one commentator has explained, "[t]he more uncertain

the inducement, the greater the witness's incentive to tailor his testimony to please the government, precisely because the witness does not know exactly what he will get for his cooperation, and hopes for the very best." Cassidy, "*Soft Words of Hope:*" Giglio, *Accomplice Witnesses, and the Problem of Implied Inducements*, 98 Nw. U. L. Rev. 1129, 1154 (2004); *see also Boone* v. *Paderick*, 541 F.2d 447, 451 (4th Cir. 1976) ("[B]ecause a promise to recommend leniency (without assurance of it) may be interpreted by the promisee as contingent upon the quality of the evidence produced[,] the more uncertain the agreement, the greater the incentive to make the testimony pleasing to the promisor."). For this reason, permitting the government to suppress evidence of leniency provided pursuant to tacit understandings would severely undercut the purpose of *Giglio*: allowing impeachment of prosecution witnesses.[6]

Moreover, requiring that prosecutors disclose only express cooperation agreements could lead to potential abuse. Under such a regime, a prosecutor could stop short of entering into an express cooperation agreement with a witness, thereby securing that witness's cooperation through implicit suggestions that the witness will receive leniency without exposing the witness to cross-examination about his or her motivations.

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[6] Requiring an express agreement simply "pressures courts ... to distort the meaning of 'agreement' and to equate circumstantial evidence of an agreement with an agreement." Joy & McMunigal, *Implicit Plea Agreements and* Brady *Disclosure*, 22 Crim. Just. 50, 52 (2007).

B. The Lower Courts Have Adopted Vastly Different Standards For Disclosure Of Evidence Of Leniency Toward A Prosecution Witness

The lower courts have taken starkly divergent positions regarding the disclosure of government leniency toward prosecution witnesses. The confused state of the law in this area further counsels review by this Court.

1. As noted above, the Courts of Appeals for the Eighth and Ninth Circuits and the Supreme Court of Connecticut have held that government leniency toward a prosecution witness, or the opportunity for such leniency, is subject to disclosure under *Brady* even in the absence of any kind of cooperation agreement, express or implied. *See Reutter*, 888 F.2d at 582; *Benn*, 283 F.3d at 1057-1058; *Hovey*, 458 F.3d at 918; *Floyd*, 756 A.2d at 822-823, 827.

By contrast, the Court of Appeals for the Seventh Circuit has declined to require disclosure of leniency in the absence of at least an implicit agreement. In *Wisehart*, the court "refus[ed] to recognize" what it called a "fourth *Brady* category, in which the state merely doesn't come down as hard on a witness as it could." 408 F.3d at 324. Although acknowledging that an implicit cooperation agreement is subject to disclosure, the court concluded that "'[w]ithout an agreement [of some kind], no evidence [i]s suppressed, and the state's conduct, not disclosing something it did not have, cannot be considered a *Brady* violation.'" *Id.* at 325 (quoting *Todd* v. *Schomig*, 283 F.3d 842, 849 (7th Cir. 2002)). The court did not dispute that the government's decision, for example, not to charge a witness with a crime would have some impeachment value. *Wisehart*, 408 F.3d at 325. But the court thought that value too "slight" to justify the burden of disclosure, noting that

"[a]ny time the government had omitted to charge [a prosecution] witness with a crime, the omission would have to be disclosed to defense counsel and explained to the jury." *Id.*; *see also Bell*, 512 F.3d at 233-234 (following *Wisehart*).

2. The federal courts of appeals have also reached different conclusions about the type of evidence that is required to demonstrate an implicit understanding regarding leniency that is subject to disclosure. By definition, an implicit understanding does not involve express statements establishing the agreement. Courts therefore must determine what kinds of circumstantial evidence of an agreement must be disclosed.

At one end of the spectrum of decisions, the Court of Appeals for the Ninth Circuit has held that a tacit agreement could be implied from the mere fact that the government declined to bring a forfeiture action against a prosecution witness who had assets acquired from drug profiteering. *See Shaffer*, 789 F.2d at 689-690. On the other hand, the Court of Appeals for the Sixth Circuit in *Bell* determined that there was no implied agreement that the prosecutor would seek early parole for a cooperating witness even though the prosecutor's notes indicated that the witness was seeking leniency in exchange for his testimony, a different prosecutor subsequently decided not to pursue a number of charges against the witness, and, after trial, the prosecutor sent a letter to the parole board on the witness's behalf. *See* 512 F.3d at 233. By contrast, the dissent in *Bell* would have required disclosure of (1) "any evidence that reasonably suggests that the prosecutor conveyed an expectation of favorable treatment to the testifying witness"; and (2) any evidence in the government's possession "that suggests that the witness actually harbors an expectation of favorable treatment,

regardless of whether the prosecution created such an expectation." *Id.* at 246 (Clay, J., dissenting).

The federal courts of appeals also have reached differing conclusions about whether assurances by the government short of promises of leniency can give rise to disclosure obligations. In *Risha*, the Court of Appeals for the Third Circuit concluded that the government's assurance that cooperation would be "taken in consideration" was subject to disclosure under *Brady*. *See* 445 F.3d at 300-302 (internal quotation marks omitted). But the Court of Appeals for the Eleventh Circuit in *Tarver* v. *Hopper*, 169 F.3d 710 (11th Cir. 1999), concluded that the same assurance was "too preliminary and ambiguous to demand disclosure." *Id.* at 717. Indeed, while that court has finely parsed the precise wording used by the government in various situations, *see id.* (discussing various permutations), other courts have been less exacting, *see, e.g.*, *Monroe*, 323 F.3d at 301 n.23 (requiring disclosure of implicit agreement where government indicated that cooperation "would not hurt" witness (internal quotation marks omitted)); *Hovey*, 458 F.3d at 915 ("'things would be better for him' if he testified").

The federal courts of appeals are also split on the question whether a prosecution witness's subjective expectation of leniency is subject to disclosure under *Brady*. In *Hill* v. *Johnson*, 210 F.3d 481 (5th Cir. 2000), the Court of Appeals for the Fifth Circuit held that a witness's mere expectation of leniency is not *Brady* material. In that case, the district court determined that certain prosecution witnesses believed they had an implied agreement with the prosecution that they would receive leniency in exchange for their testimony, but that there was no evidence the district attorney intended to or actually had provided lenient treatment in

exchange for testimony. *Id.* at 486. In denying the defendant Hill's request for a certificate of appealability, the Court of Appeals stated, "Hill [does not] point[] to a Supreme Court decision holding that the subjective beliefs of witnesses regarding the possibility of future favorable treatment are sufficient to trigger the State's duty to disclose under *Brady v. Maryland* ... and *Giglio*[.]" *Id.* (internal citation omitted).

But, as noted above, the Court of Appeals for the Third Circuit in *Risha* held that a prosecution witness's "expectation of leniency in the state proceedings could have been used to impeach him" and thus was "favorable to the defense." 445 F.3d at 303 n.5. Additionally, the Court of Appeals for the Sixth Circuit in *Bell* v. *Bell* held that the prosecutor's notes indicating that a prosecution witness was seeking leniency in exchange for his testimony was favorable evidence under *Brady*. *See* 512 F.3d at 232-233.

III. THE D.C. COURT OF APPEALS' APPLICATION OF *STRICKLAND* CONFLICTS WITH DECISIONS OF FEDERAL COURTS OF APPEALS AND *STRICKLAND* ITSELF

The Court also should review the Court of Appeals' rejection of Quigley's claim that his trial counsel provided ineffective assistance by failing to challenge Sheril Taylor's false testimony that she is Quigley's cousin. In conflict with decisions of federal courts of appeals and in tension with *Strickland* itself, the D.C. Court of Appeals' decision as to this issue would permit consideration of hypothetical motivations contrary to the expressed actual motivations of counsel.

A. The Court Of Appeals Rejected Quigley's Claim By Positing A Hypothetical Motivation For Counsel's Failure To Impeach Taylor That Was Contrary To Record Evidence Of Counsel's Actual Motivation

The D.C. Court of Appeals rejected Quigley's ineffective assistance of counsel claim on the basis of a hypothetical rationale that was contrary to the clearly unreasonable explanation for his actions that Quigley's trial counsel actually offered. In response to Quigley's initial § 23-110 motion, Quigley's trial counsel submitted an affidavit stating that he did not impeach Taylor's false testimony that she is Quigley's cousin because during direct examination of Taylor, the prosecutor "solicited that she was not a biological cousin to Mr. Quigley." App. 42a. As a result, counsel claimed, he saw "no need to explore [the issue] further on cross." *Id.* Counsel's assertion that Taylor testified she was not Quigley's biological cousin is false. In her testimony, Taylor indicated that her mother and Quigley's mother were half-sisters (Trial Tr. vol. II, 445:25-446:6), which would make Quigley and Taylor biological cousins.

Setting aside the record evidence of counsel's obviously inadequate explanation for his actions, the Court of Appeals hypothesized a better justification. The court asserted that in his affidavit Quigley's trial counsel "explained that he chose not to delve into this relationship because Sheril Taylor clarified at trial that she and appellant were not biological cousins, *but instead that her mother and appellant's mother were half-sisters.*" App. 13a (emphasis added). The italicized portion of the Court of Appeals' assertion did not appear in counsel's affidavit but instead was assumed by the Court of Appeals. Thus, the Court of Appeals

effectively held that under the deficiency prong of *Strickland*, even when counsel's actual motive for a challenged action is known, a court may sustain counsel's actions based on a contrary hypothetical justification.

B. The D.C. Court Of Appeals' Reliance On A Hypothetical Motivation Where Counsel's Actual Motivation Was Known Conflicts With Decisions Of Federal Courts Of Appeals And Is Inconsistent With *Strickland*

The D.C. Court of Appeals' application of the deficiency prong of *Strickland* conflicts with decisions of the Courts of Appeals for the Third and Seventh Circuits and is inconsistent with *Strickland* itself. The Court of Appeals for the Seventh Circuit has recognized that "[j]ust as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer." *Harris* v. *Reed*, 894 F.2d 871, 878 (7th Cir. 1990). Thus, that court has held that when counsel's motives are known, courts may not construct hypothetical reasons for counsel's decisions in order to find them reasonable under the deficiency prong of *Strickland*. *Id.* at 878 (in light of counsel's testimony that his failure to call witnesses or present evidence was attributable to his unreasonable belief that the prosecution's case was weak, the district court erred in constructing a hypothetical justification that counsel did not offer).[7]

Similarly, the Court of Appeals for the Third Circuit has held that a reviewing court may not rely on

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[7] *See also Goodman* v. *Bertrand*, 467 F.3d 1022, 1029 (7th Cir. 2006); *Broum* v. *Sternes*, 304 F.3d 677, 692 (7th Cir. 2002).

"hypothetical strategies to explain defense counsel's uninformed prejudicial oversights" where counsel's *actual* motivation is known. *Thomas* v. *Varner*, 428 F.3d 491, 499-500 & n.7 (3d Cir. 2005). The court in *Thomas* explained that when deciding a *Strickland* challenge, "the presumption is that counsel's conduct might have been part of a sound strategy." *Id.* at 499. But this presumption is rebutted if the defendant can show that counsel's "conduct was not, in fact, part of [this] strategy." *Id.*

Indeed, reliance on hypothetical motivations when actual motivations are known is inconsistent with *Strickland* itself. In *Strickland*, this Court explained that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689. While judicial review of the performance of counsel requires significant deference to counsel's capacity to make reasonable strategic decisions, the requirement that the assessment be made "from counsel's perspective at the time" suggests (as the Courts of Appeals for the Seventh and Third Circuits have held) that reviewing courts cannot simply ignore oral or written testimony clearly stating counsel's true motivations. If counsel's reasoning is known, ascribing to him motivations he did not have introduces the very "distorting effects of hindsight" that the *Strickland* test was designed to eliminate.

Because the D.C. Court of Appeals ignored the actual and erroneous motivation of Quigley's trial counsel in favor of a justification of its own, the court's decision conflicts with decisions of the Courts of Appeals for the Seventh and Third Circuits and is in tension with

Strickland itself. The Court should grant review to address this conflict and reaffirm that courts may not ignore counsel's stated motivations.[8]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[8] The D.C. Court of Appeals' conclusion that any deficient performance was not prejudicial understates the level of importance of Taylor's false testimony that she was Quigley's cousin. Taylor was cross-examined about prior convictions, admitted drug use on the night of the shooting and on the day of her testimony, and prior inconsistent statements about the events she witnessed. Prosecutors, therefore, relied heavily on the argument that Taylor would not have testified falsely against her own cousin. Indeed, the prosecution noted 21 times in opening statement and closing argument that Taylor and Quigley were cousins. Trial Tr. vol. I, 171:7-182:9; Trial Tr. vol. III, 692:7-715:25, 727:15-740:9. Taylor's testimony was even more important in light of the equivocal evidence against Quigley. As noted above, Sharon Dyson, a supposed eye-witness, admitted to being unable see the shooter's face in the dark from inside her apartment over 120 feet away at 2:00 in the morning. Lawrence Dyson never saw Quigley with a gun. Only Robinson—who was cooperating with the government and might himself have been the shooter—claims to have seen Quigley shoot Wilson and Dyson. Finally, fingerprints on the gun allegedly used in the shooting did not match Quigley's. *See supra* pp. 6-12.

Respectfully submitted,

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JUNE 2008

APPENDIX

APPENDIX A

DISTRICT OF COLUMBIA
COURT OF APPEALS

NOS. 03-CF-566, 04-CO-455, 05-CO-1266

RAYMOND E. QUIGLEY,
Appellant,
F-7850-01

v.

UNITED STATES,
Appellee.

APPEAL FROM THE SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

(Hon. Judith E. Retchin, Trial Judge)

(Argued June 19, 2007 Decided July 5, 2007)

Before FARRELL and BLACKBURNE-RIGSBY, *Associate Judges*, and SCHWELB, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Following a jury trial, appellant, Raymond E. Quigley, was convicted of first-degree murder while armed (premeditated),[1] aggravated as-

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[1] *See* D.C. Code §§ 22-2101, 4502 (2001).

sault while armed,[2] two counts of possession of a firearm during a crime of violence,[3] carrying a pistol without a license,[4] possession of an unregistered firearm,[5] and unlawful possession of ammunition,[6] in connection with the fatal shooting of Kimothy Wilson and the nonfatal shooting of Lawrence Dyson on November 30, 2001.

Subsequent to the jury verdict, appellant filed two motions for relief in accordance with D.C. Code § 23-110 (2001). In his first section 23-110 motion, filed *pro se* on May 8, 2003, appellant alleged, *inter alia*, that his trial counsel: (1) failed to investigate the government's case brought against him; (2) failed to inform appellant that he was not going to call a witness whom appellant requested to be called in his defense; (3) failed to introduce medical evidence on his behalf; (4) failed to properly cross examine a government witness; (5) failed to obtain weather reports for the day of the incident at issue; and (6) failed to obtain and provide appellant with certain discovery. Appellant filed, through appointed counsel, a supplemental 23-110 motion on February 10, 2004, asserting additional ineffective assistance of counsel claims. Primarily, appellant alleged that his trial counsel was ineffective for failing to cross examine a witness about an inconsistent physical description the witness gave of the shooter to the police on the night of the shooting. The trial court denied this motion and determined that a hearing was not required

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[2] *See* D.C. Code §§ 22-404.1, 4502 (2001).

[3] *See* D.C. Code § 2-4504 (b) (2001).

[4] *See* D.C. Code § 22-4504 (a)(2) (2001).

[5] *See* D.C. Code § 7-2502.01 (2001).

[6] *See* D.C. Code § 7-2506.01 (3) (2001).

because the motion could be resolved on the available record.

Appellant filed a second section 23-110 motion on May 27, 2005, in support of which he alleged that: (1) the government failed to disclose promises of leniency to a government witness in violation of *Giglio v. United States*, 405 U.S. 150 (1972) and *Brady v. Maryland*, 373 U.S. 83 (1963) which, appellant claimed, were favorable to his defense at trial; and (2) in the alternative, appellant alleged that his trial counsel failed to investigate the criminal record of a government witness. The trial court also denied this motion and determined that appellant's claims could be resolved on the available record and that a hearing was not required.

In this consolidated appeal, appellant contends that the trial court abused its discretion in summarily denying both of his section 23-110 motions for relief, and the trial court further erred in finding that the evidence was sufficient to support his conviction for first degree premeditated murder while armed. Finding neither an abuse of discretion nor error, we affirm the decision of the trial court.

I. TRIAL EVIDENCE

The evidence presented at trial is as follows. On November 29, 2001, Lawrence Dyson ("Dyson") and his cousin, Kimothy Wilson ("Wilson") went to visit Dyson's aunt, Sharon Dyson, who lived in a second-floor apartment at 1723 Capitol Avenue, N.E., Washington, DC. After parking their car, Dyson and Wilson stopped and talked briefly with Milton Robinson ("Robinson"), who was sitting outside of his apartment building located at 1708 Capitol Avenue, N.E. Dyson, Wilson and Sharon Dyson eventually left Sharon Dyson's apartment and walked down the street to visit Dyson's

friend Nickie, who lived at 1700 Capitol Avenue, N.E.. Shortly thereafter, Sharon Dyson left Nickie's apartment and walked up Capitol Avenue to her apartment. Upon leaving, Sharon Dyson saw appellant sitting on the steps to Robinson's building, and noticed that appellant was wearing dark clothes and a yellow hat.

Wilson and Dyson also eventually left Nickie's apartment and approached Robinson's building, where Dyson testified that he saw Robinson and a man whom he had never seen before, but whom he later identified as appellant, sitting on the building steps. Dyson testified that he tried to enter the building, but appellant refused to let him inside and stated that "people were taking care of business," after which Dyson suggested to Wilson that they leave. According to Dyson's testimony, as he and Wilson were walking away from appellant and Robinson, Wilson said, "fuck you," loud enough so that appellant and Robinson, who were still sitting on the steps, could hear it. Dyson then heard a gun being cocked, looked back at the steps and saw appellant stand up and move his hands. Dyson began to run and told Wilson to do the same. Dyson testified that he heard Robinson say "no, no" and Wilson say "don't shoot us, don't shoot us," and then heard several shots coming from the direction of Robinson and appellant. Dyson was hit with a bullet in the back of his right thigh. Wilson later died from his gunshot wounds.

On two occasions after the shooting, Dyson described the shooter to the police, and later identified appellant's photograph in a photo array as the individual who he saw on the steps of Robinson's building the day of the incident. Robinson gave a statement to the police and also identified appellant as the shooter. At appellant's trial, Robinson testified that he saw appel-

lant shoot Wilson five or six times and then chase Dyson down the street while shooting at him.

Sharon Dyson also testified at trial that after arriving at her home, the sound of gun shots drew her attention outside. Upon hearing the gunshots, she looked out of her front window, which looked out onto Capitol Avenue, and stuck her head out to look up the street toward the 1700 end of the block. She was able to see someone running and another person following, while firing a gun. Sharon Dyson identified the shooter as appellant, based on his build, dark clothing, and primarily the yellow hat, and Dyson as the individual that was being chased.

Sheril Taylor testified that in the early morning hours of November 30, 2001, she was sleeping on her couch in her apartment located at 1700 Capitol Avenue, when she heard gunshots. After hearing the gunshots, Sheril Taylor went to her second floor window, which looked out onto Capitol Avenue, and saw two men running. One of the men was running in front of the other, and the man running behind the other man was holding a gun. At trial, Taylor testified that she recognized the appellant as the individual holding the gun and chasing the man in front. She also described herself as appellant's "cousin," and testified that appellant was staying with her three weeks before the shooting and on the evening of the shooting.

On December 7, 2001, James Burroughs, who lived in an apartment on 1719 Capitol Avenue, N.E., answered his door to find two policemen who requested permission to search the apartment. He consented to a search and the police discovered a loaded gun on a shelf

on the back porch.[7] Ballistics tests established that the gun police recovered from the porch was the same gun used to fire three shell casings and bullets that were found the night of the shooting outside of 1708 Capitol Avenue. At trial, Sheril Taylor identified the gun recovered from Burrough's apartment as the same gun she had previously seen in appellant's possession. Ms. Taylor described the gun as "black and raggedy" with a cardboard handle. Robinson also testified that the gun he saw appellant use to shoot Wilson and Dyson, and which he had previously seen appellant with, was a "black gun with a raggedy handle."

II. *BRADY* CLAIMS

Appellant argues that the trial court erroneously denied his section 23-110 motion, in which he argued that the government violated his due process rights by failing to disclose that criminal charges against Robinson were resolved by plea agreement while the case against appellant was still pending. *See Brady, supra*, 373 U.S. 83; *Giglio, supra*, 405 U.S. 150. Appellant also argues that the government violated *Brady* by failing to disclose that Robinson was convicted for selling heroin from his apartment at 1708 Capitol Avenue (where the shooting took place) just eight days after the shooting of Wilson and Dyson. According to appellant, this information was favorable to him and there was a reasonable probability that the outcome of his trial would have been different had this information been available

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[7] At trial, Burroughs testified that he had been alone in the apartment before he went to sleep on December 6, 2001, but unbeknownst to him, appellant and his girlfriend were sleeping on the pullout sofa bed when the police arrived to the apartment on December 7, 2001.

for use in his defense. We disagree with appellant's contention.

Our review of the denial of a section 23-110 motion is a mixed question of both law and fact. "Insofar as [section 23-110] rulings rest upon findings of fact, [this court] will not reverse the trial court's determinations if they are supported by evidence in the record, *Lindsey v. United States*, 911 A.2d 824, 840 (D.C. 2006) (quoting *Bouknight v. United States*, 867 A.2d 245, 251 (D.C. 2005), but we owe no deference to the trial court on the ultimate question of law. *See Curry v. United States*, 498 A.2d 534, 540 (D.C. 1985).

In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[8] 373 U.S. at 87; *see also Ginyard v. United States*, 816 A.2d 21, 32 (D.C. 2003). The duty announced in *Brady* "extends to evidence that could be used to impeach the credibility of a government witness." *Ginyard, supra*, 816 A.2d at 32. When *Brady* material "has not been timely disclosed, reversal 'is warranted *only* where there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.'" *Farley v. United States*, 161 A.2d 225, 228 (D.C. 2001) (emphasis in original; citation omitted).

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[8] In *Giglio, supra*, the Supreme Court reaffirmed its holding in *Brady* that where the government has failed to disclose exculpatory information about a defendant prior to trial, a finding of materiality is required before a new trial is warranted. *See* 405 U.S. at 154.

The trial court found no evidence that Robinson's plea agreement was connected to his testimony against appellant and rejected appellant's due process claims under *Brady*. The plea agreement at issue concerned offenses unrelated to the shooting of Wilson or Dyson and were the result of two other crimes. On April 11, 2002, Robinson pled guilty to distribution of heroin on December 8, 2001 (eight days after the shooting at issue) and failing to appear in court in connection with the distribution offense on March 1, 2002. In exchange for Robinson's guilty plea, the government agreed to dismiss a separate charge against Robinson for possession of heroin with intent to distribute, withdraw sentencing papers, and not charge him with contempt for violating a stay away order issued in connection with the distribution charge. On May 30, 2002, Robinson was sentenced on the distribution and failure to appear charges. The trial court found persuasive, as we do here, the timing of the events surrounding Robinson's plea agreement. Specifically, Robinson identified appellant as the shooter in a photo array on December 6, 2001, six days after the shooting, and two days before Robinson committed the distribution offense. Robinson testified consistently with this prior identification at the subsequent grand jury hearing on January 10, 2002, and later at appellant's trial on October 28-29, 2002. Robinson entered his guilty plea on April 11, 2002, six months before appellant's trial, and was sentenced on May 20,2002, five months before appellant's trial.

Considering the timing of these events, it is unlikely that Robinson would have been in a position to "color" his testimony to receive a more lenient sentence in his own criminal case since the events and circumstances surrounding Robinson's plea agreement occurred after Robinson initially identified appellant as

the shooter, Robinson entered a guilty plea six months before appellant's trial, in which he identified appellant again as the shooter, and Robinson was sentenced on these charges five months before appellant's trial. Further, Robinson testified before the grand jury that he had not been promised anything by the government in exchange for his testimony about the shooting:

Q. You have a pending case against you. Correct?

A. Yeah.

Q. And we haven't discussed that pending case at all, have we?

A. No.

Q. In any way, shape or form. We have not talked about that case?

A. No.

Q. You haven't been promised anything or given any benefits to get you to testify before the Grand Jury here today, have you?

A. No.

Moreover, the government's opposition to appellant's second section 23-110 motion contained an affidavit from Assistant United States Attorney ("AUSA") Florence Pan,[9] in which she stated that neither she, nor the other prosecutor in the case, ever made any prom-

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[9] Although we acknowledge appellant's contention that the prosecutor did not produce affidavits from other members of the prosecution team who may have been more knowledgeable of whether any promises were made to Robinson, it is the totality of the circumstances surrounding the at-issue plea upon which we rely in reaching our conclusions.

ises to Robinson regarding the disposition of his own criminal case in connection with his testimony and cooperation in the prosecution of appellant. Giving deference to the trial court's considerations, as well as the strength of the government's evidence of guilt at trial, we are not persuaded that evidence of Robinson's plea agreement would have been favorable to the defense's theory of the case, nor would it have been material to the outcome of the trial. Absent a showing of materiality, there can be no *Brady* violation. *See Robinson v. United States*, 825 A.2d 318, 325 (D.C. 2003). As such, the trial court did not err in finding that appellant's *Brady* violations were without merit and in denying his section 23-110 motion.

Appellant's assertion that the government violated *Brady* by failing to disclose that Robinson was arrested at 1708 Capitol Avenue (the location of the shooting) for selling heroin also lacks merit. The record establishes that evidence of the location of Robinson's distribution charge would not have undermined the confidence of the jury in its verdict. Specifically, Robinson admitted to selling heroin on December 8, 2001, but also testified that lie was not selling drugs on the night of the shooting. As argued by the government, there is no reason to believe that, if defense counsel had cross-examined Robinson about the location of his distribution conviction, Robinson would have changed his testimony and admitted to selling drugs at his apartment on the night of the shooting. Further, even if Robinson had been dealing drugs from the apartment that evening, that fact would create at most a "reasonable possibility," *Strickler v. Greene*, 527 U.S. 263, 291 (1999), that he was the actual shooter without evidence—absent here—that he believed or had any reason to believe Dyson or Wilson posed a threat to his "stash" or drug

operation. In addition, as mentioned above, the relative strength of the government's case mitigates appellant's argument that this evidence would have been material to the outcome of trial. Therefore, because there was no reasonable probability that, had this evidence been disclosed, the results of appellant's trial would have been different, the trial court did not err in denying appellant's section 23-110 motion based on this contention.

III. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Appellant also contends that the trial court erred in denying his section 23-110 motion, in which he argued that his trial counsel was ineffective by: (1) failing to cross-examine Robinson at trial regarding his conviction for selling drugs in the area of the shooting; and (2) by failing to cross-examine Robinson regarding whether the government had promised him leniency in exchange for his testimony. Appellant argues that his trial counsel's failure to investigate Robinson's conviction was prejudicial because it would have both impeached Robinson's testimony that he was not dealing drugs near the time of the shooting, and it would have bolstered appellant's defense that Robinson shot Wilson and Dyson to protect his drug stash at 1708 Capitol Avenue.

In order to prevail on an ineffective assistance of counsel claim, a convicted defendant must satisfy two components. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, he must show that his trial counsel's assistance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. *Id.* at 687-88. Second, the defendant must show that there is a reasonable probability that the error affected the outcome of the trial to his prejudice. *Id.* at 687. Because the *Strickland* standard for

prejudice is the same as the *Brady* standard for materiality, *see Strickland*, *supra*, 466 U.S. at 694, *United States v. Bagley*, 473 U.S. 667, 682 (1985), for the same reasons that evidence of Robinson's plea agreement is not material under *Brady*, the record establishes that trial counsel's failure to discover and cross examine Robinson about the circumstances surrounding the plea agreement—i.e., that the distribution offense occurred at the same location as the shooting—is not prejudicial under *Strickland*. In the absence of prejudice, the court need not evaluate whether appellant's trial counsel was deficient. *See Strickland*, *supra*, 466 U.S. at 692 ("[A]ny deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.").

In addition to appellant's claims of error due to his trial counsel's failure to cross examine Robinson about the circumstances surrounding his plea agreement, appellant contends that his trial counsel rendered ineffective assistance by: (1) permitting the government to repeatedly identify Sheril Taylor as his cousin at trial; (2) declining to call Alice Morris as a witness; and (3) failing to impeach Dyson with an inconsistent description Dyson allegedly gave of appellant to police at the time of the shooting. We are similarly unpersuaded by these ineffective assistance of counsel claims.

To begin, appellant's claim that his trial counsel's performance was ineffective because he failed to impeach Sheril Taylor with respect to her relationship to appellant is without merit. Appellant had initially claimed that Ms. Taylor was his cousin, but later denied this relationship after appellant's trial counsel encountered Ms. Taylor at a pre-trial hearing and reported back to appellant that Ms. Taylor had told him that she was at the hearing as a government witness. In an af-

fidavit submitted with the government's opposition to appellant's motion, appellant's trial counsel explained that he chose not to delve into this relationship because Sheril Taylor clarified at trial that she and appellant were not biological cousins, but instead that her mother and appellant's mother were half-sisters, and that he saw no need to explore this issue further on cross examination. Furthermore, even if appellant and Ms. Taylor were not cousins, establishing that fact on cross examination would not have undermined her testimony about her close relationship with the appellant—e.g., she testified that she had known appellant all her life, and that he stayed at her apartment for three weeks before the shooting, as well as the night of the shooting. Therefore, there is no reasonable probability that the outcome of trial would have been different had appellant's trial counsel impeached Ms. Taylor on this issue.

Similarly, appellant's claim that his trial counsel was ineffective for declining to call Alice Morris as a witness is without merit. Appellant contends that Ms. Morris could have been used to impeach Sharon Dyson because she allegedly told Ms. Morris that she had not seen appellant shoot Wilson or Dyson. In an affidavit submitted with the government's opposition to appellant's motion, appellant's trial counsel explained that his private investigator interviewed and subpoenaed Ms. Morris as requested by appellant. When Ms. Morris appeared for trial, she denied having any knowledge of the shooting. Appellant's counsel became concerned after these interviews that not only was this witness unreliable and did not know "anything about anything," but he was convinced that she was addicted to some form of a narcotic and was barely coherent during their interviews. Furthermore, appellant's trial counsel learned that Ms. Morris had been subpoenaed by the

government, and she speculated that it could have something to do with phone calls made to her by appellant. Given her unreliability and the potential for the prosecutor to use her testimony about these phone calls, appellant's trial counsel decided not to call Ms. Morris as a witness. Therefore, the record indicates that appellant's trial counsel identified factors that reasonably counseled against putting Ms. Morris on the witness stand and the decision not to call Ms. Morris as a witness was a tactical one. *See e.g., Ginyard, supra,* 816 A.2d at 38 ("[W]hen evaluating the performance of counsel, trial counsel must be given sufficient latitude to make tactical decisions and strategic judgments which involve the exercise of professional abilities.") (citation omitted); *see also Strickland, supra,* 466 U.S. at 689.

Lastly, appellant's claim that his trial counsel was ineffective by failing to impeach Dyson with an inconsistent description Dyson allegedly gave of appellant to police at the time of the shooting is also without merit. In a police report dated November 30, 2001, appellant is described as 6'2" and 185 pounds, and appellant alleged that this description was provided by Dyson on the day of the shooting. Appellant alleged in his section 23-110 motion that he was 5'8" and weighed almost 200 pounds. However, as the government contends, even if Dyson was the source of this information in the police report, this claim still does not meet the demands of *Strickland.* Appellant's trial counsel cross examined Dyson on critical points of his testimony and elicited from Dyson that he never saw appellant with a gun or fire a gun, and established that Dyson had used drugs earlier in the day of the shooting. This information can reasonably be said to have both challenged Dyson's credibility as well as his ability to recall the events on

the day of the shooting in favor of appellant. Nonetheless, it certainly would not have changed the outcome of appellant's trial.

In sum, we conclude that trial counsel's performance did not fall below prevailing professional norms, and there is no reasonable probability that even if trial counsel had done what appellant argues he failed to do, that the outcome of his trial would have been different, especially considering the strong evidence of guilt presented by the government. Thus, we conclude that the trial court did not err in denying appellant's section 23-110 claims based on ineffective assistance of counsel.

IV. SECTION 23-110 HEARING

Appellant also argues that the trial court erred in denying his section 23-110 motions without a hearing. "[W]here the court is faced with a claim of ineffective assistance of counsel, the statute creates a presumption that a hearing should be held[.]" *Long v. United States*, 910 A.2d 298, 308 (D.C. 2006) (citing *Newman v. United States*, 705 A.2d 246, 261 (D.C. 1997)). However, the decision of whether to hold a hearing lies within the sound discretion of the trial court, *see Sykes v. United States*, 585 A.2d 1335, 1340 (D.C. 1991), and the trial court is not required to hold a hearing on a section 23-110 motion when "the motion and files and records of the case conclusively show that the prisoner is entitled to no relief." D.C. Code § 23-110; *see also Ready v. United States*, 620 A.2d 233, 234 (D.C. 1993); *Derrington v. United States*, 488 A.2d 1314, 1341 (D.C. 1985) (concluding that *Brady* allegations in a motion to vacate were insufficient to require the trial court to hold a hearing) and *Mercer v. United States*, 864 A.2d 110, 118 (D.C. 2004) (concluding that ineffective assistance of

counsel claims in a motion to vacate could be resolved on the basis of the available record).

Here, the trial court determined that a hearing was not required for either of appellant's section 23-110 motions because both could be resolved on the available record. For the first 23-110 motion, filed on May 8, 2003, and the second section 23-110 motion filed on May 27, 2005, the trial court had before it, among other things: (1) an affidavit by appellant's trial counsel addressing appellant's ineffective assistance of counsel claims; (2) the trial testimony; (3) Robinson's grand jury testimony in which he denied receiving any acts of leniency in exchange for his testimony in appellant's trial; (4) a transcript from Robinson's sentencing hearing, in which the trial court asked Robinson's attorney about "the terms of the agreement [he] had with the United States," and Robinson's attorney responded that the government would dismiss the PWID charge in exchange for Robinson's plea, and no mention was made of a deal between Robinson and the government in any other case; and (5) the affidavit of AUSA Florence Pan, who represented the United States in the prosecution of Robinson and stated that no promises were made by the government to Robinson in relation to his own criminal case. Based on this record, appellant offers, at most, the speculative possibility that under questioning at a hearing Robinson would have disavowed his past statements and admitted either that additional, undisclosed promises had been made to him, or that he perceived advantage from cooperating, beyond the benefits he received for pleading guilty and of

which the jury had been made aware.[10] *See e.g., Sykes,*

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[10] Appellant also argues that his conviction for first-degree premeditated murder should be reversed because the government failed to demonstrate that he had the requisite premeditation and deliberation to kill. When reviewing claims of insufficiency of the evidence, we will reverse a conviction only where there is no evidence from which "a reasonable juror could fairly conclude guilt beyond a reasonable doubt." *See e.g., Head v. United States,* 451 A.2d 615, 622-23 (D.C. 1982); *Dunham v. District of Columbia,* 442 A.2d 121, 128 (D.C. 1982). To establish first-degree premeditated murder while armed, the government must prove that the accused committed the crime intentionally with premeditation and deliberation while armed. D.C. Code §§ 22-2101,4502. "To prove premeditation, the government must show that a defendant, before acting, gave thought to the idea of taking a human life and reached a definite decision to kill, while deliberation is proved by demonstrating that the accused acted with consideration and reflection upon the preconceived design to kill." *Busey v. United States,* 747 A.2d 1153, 1161. (D.C. 2000) (citation omitted).

We conclude that there was sufficient evidence from which the jury could find beyond a reasonable doubt that Wilson's murder was premeditated and deliberated. Our conclusion is supported by the following facts proven at trial: As Wilson and Dyson were walking back to their car after being turned away from appellant's apartment, Wilson said "fuck you" in appellant's direction. Dyson then glanced back at appellant and saw him stand up from his chair and move his hands. Dyson heard a gun being cocked and heard Robinson say, "no, no." Dyson then turned back around, told Wilson to run, and began to run himself. Dyson could hear Wilson say, "don't shoot us, don't shoot us," and then heard several shots. Viewing this evidence in a light most favorable to the government, it can be reasonably inferred that in the time between Wilson's statement in appellant's direction, and the shots being fired, appellant "gave thought to the idea of taking a human life and reached a definite decision to kill," and then proceeded to act with consideration and reflection to do so. *See Busey, supra,* 747 A.2d at 1161. Therefore, there was sufficient evidence to support the premeditated murder charge, and we will not disturb this conviction on appeal.

supra, 585 A.2d at 1340 (D.C. 1991) (finding that "the trial judge . . . is in a far better situation than an appellate court to determine whether . . . a hearing [was required on a section 23-110 motion] . . . ."). We therefore conclude that the trial court did not err in denying either of appellant's section 23-110 motions.

Affirmed.

ENTERED BY DIRECTION
OF THE COURT

/s/ Garland Pinkston, Jr.
Garland Pinkston, Jr.
Clerk of the Court

Copies to:

Clerk, Superior Court

Hon. Judith E. Retchin

Roy W. McLeese III, Esq,
USAO

Brian M. Boynton, Esq.
Wilmer Cutler
1875 PA Ave., NW (06)

APPENDIX B

DISTRICT OF COLUMBIA
COURT OF APPEAL

NOS. 03-CF-566, 04-CO-455, 05-CO-1266

RAYMOND E. QUIGLEY,
Appellant,
FEL7850-01

v.

UNITED STATES,
Appellee.

[STAMP: FILED
FEB 19 2008]

BEFORE: Washington, Chief Judge; *Farrell, Ruiz, Reid, Glickman, Kramer, **Fisher, *Blackburne-Rigsby, and Thompson, Associate Judges; *Sehwelb, Senior Judge.

ORDER

On consideration of appellant's petition for rehearing and rehearing en banc, and the opposition thereto, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

** Associate Judge Fisher has recused himself from these cases.

Copies to:

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Assistant United States Attorney

APPENDIX C

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION—FELONY BRANCH

UNITED STATES

v.

RAYMOND QUIGLEY, JR.

CRIMINAL NO. F-7850-01
CLOSED CASE
JUDGE RETCHIN

[STAMP: RECEIVED
PUBLIC DEFENDER SERVICE
APR 26 2004
APPELLATE DIVISION]

ORDER
(April 23, 2004)

This matter is before the Court on defendant's Motion Attacking Sentence Pursuant to D.C. Code § 23-110, defendant's Supplemental Motion to Vacate, Set Aside or Correct Sentence, the government's Opposition to Defendant's *Pro Se* Motion Attacking Sentence Pursuant to D.C. Code § 23-110 and the government's Reply to Defendant's Supplemental Motion to Vacate, Set Aside or Correct Sentence. The Court has determined that a hearing is not required to resolve the motions because the motions can be resolved on the avail-

able record. For the reasons stated in the government's opposition to defendant's motion to attack sentence and its reply to defendant's supplemental motion, it is this 23rd day of April, 2004, hereby,

ORDERED that defendant's motions to attack sentence and supplemental motion to vacate, set aside or correct sentence are **denied**.

SO ORDERED.

/s/ Judith E. Retchin
Judith E. Retchin
Associate Judge

/signed in chambers/

APPENDIX D

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION—FELONY BRANCH

UNITED STATES

v.

RAYMOND QUIGLEY

CRIMINAL CASE NO. F-7850-01
CLOSED CASE
JUDGE RETCHIN

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PUBLIC DEFENDER SERVICE
JUL 31 2003
APPELLATE DIVISION]

GOVERNMENT'S OPPOSITION TO DEFENDANT'S *PRO SE* MOTION ATTACKING SENTENCE PURSUANT TO D.C. CODE, §23-110

The United States, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this Opposition to Defendant's *Pro Se* Motion Attacking Sentence Pursuant to D.C. Code §23-110.

PROCEDURAL HISTORY

By indictment issued August 9, 2002, the Grand Jury charged the defendant with First Degree Murder while Armed (Premeditated) (22 D.C. Code §§ 2101, 4502); Assault with Intent to Kill while Armed (22 D.C. Code §§ 401, 4502); Aggravated Assault while Armed (22 D.C. Code §§ 404.01, 4502); Carrying a Pistol without a License (22 D.C. Code § 4504(a)); Possession of an Unregistered Firearm (7 D.C. Code § 2502.03); 3 counts of Possession of a Firearm during a Crime of Violence (22 D.C. Code §4504(b)); and Unlawful Possession of Ammunition (7 D.C. Code § 2506.01(3)). On September 27, 2002, this court denied the defendant's *pro se* motion for appointment of new counsel. The defendant, through counsel, had previously filed written motions moving to suppress identification testimony, physical evidence, and statements made to the police. A suppression hearing was held on October 28, 2002, and this court denied defendant's motions. The court also conducted a *Monroe Farrell* hearing and denied defendant's motion for the appointment of co-counsel to assist at trial.

Defendant's trial began on October 28, 2002, when a jury was sworn, and ended on November 1, 2002, when the jury found the defendant guilty of First Degree Murder, Possession of a Firearm during a Crime of Violence (2 counts), Aggravated Assault while Armed, Carrying a Pistol without a License, Possession of an Unregistered Firearm, and Unlawful Possession of Ammunition.

On January 27, 2003, this court granted defendant's *pro se* motion for appointment of new counsel. On March 19, 2003, this court denied the defendant's most recent *pro se* motion requesting appointment of new counsel and a *Monroe Farrell* hearing. On April 11,

2003, this court sentenced the defendant to 50 years imprisonment for First Degree Murder, a consecutive term of 10 years imprisonment for Aggravated Assault while Armed, a consecutive term of 10 years imprisonment for Possession of a Firearm during a Crime of Violence, and concurrent terms of imprisonment on the remaining counts.

The defendant filed a timely notice of appeal. Defendant now files this motion alleging ineffective assistance of trial counsel.

FACTUAL HISTORY

The government's evidence can be summarized as follows: early in the morning on November 30, 2001, near 1708 Capitol Ave, N.E., the defendant shot and killed Kimothy Wilson. He also shot and nearly killed Lawrence Dyson. Four people, including Lawrence Dyson, witnessed the shooting and identified the defendant in court as the shooter.

More specifically, on November 29, 2001, Lawrence Dyson and his cousin, Kimothy, were visiting his aunt, Sharon Dyson, who lived in the 1700 block of Capitol Avenue, N.E. (TR. 10/29 317-19).[11] Lawrence and Kimothy traveled together by car from Maryland (TR 10/29 320). When they arrived, the first person that they saw was "Little Man" (TR 10/29 321). Lawrence did not know "Little Man's real name, but considered him a friend. (TR 10/29 322). "Little Man" was standing near his apartment building which was located in the 1700 block of Capitol Avenue, N.E., across the street from Sharon Dyson's apartment (TR 10/29 323).

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[11] Transcript references are to the date and page number of the particular transcript.

Lawrence, Kimothy, and Sharon visited for a while and then they all went to visit another person named Nickie who lived in the block (TR 10/29 326). Sharon returned alone to her apartment before Lawrence and Kimothy. A short time later Lawrence and Kimothy decided to walk back to Sharon's and passed "Little Man", who was sitting in front of 1708 Capitol Avenue, N.E. with the defendant (TR 10/29 333, 335). Lawrence and Kimothy approached the building, but the defendant told them that they were not allowed in since "people taking care of business" (TR 10/29 334). Lawrence testified that the area was well lit, he was about one arm length from the defendant with a clear unobstructed view, and looked the defendant in the eye while he spoke (TR 10/29 334-35). "Little Man" was next to the defendant. In court, Lawrence identified the defendant as the shooter (TR 10/29 333).

As Lawrence and Kimothy turned to walk away, Kimothy said "fuck you" to the defendant (TR 10/29 341). Lawrence looked over his shoulder and saw the defendant stand up. Next he heard a sound consistent with a gun being racked (TR 10/29 340-41). Lawrence told his cousin to run, "Little Man" said "No, No", and Kimothy said "Don't shoot us" (TR 10/29 341, 342, 346). Lawrence started to run and several shots were fired (TR 10/29 342). Lawrence was hit in the back of his thigh; the bullet struck an artery (TR 10/29 344). He continued to run until he collapsed and lost consciousness. He was taken to Howard University Hospital for surgery where he remained hospitalized for 2 1/2 weeks (10/29 347-348). On December 3, 2001, Lawrence looked at a photo array and identified the defendant as the man who shot him (TR 10/29 361).

Milton Robinson, a.k.a. "Little Man", lived at 1708 Capitol Avenue, N.E. in November, 2001 (TR 10/28,

194, 201). He knew the defendant because Raymond Quigley was staying with his cousin, Sheril Taylor, at 1704 Capitol Avenue, N.E. (10/28 195-96). Milton identified the defendant in court (10/28 198-99). He also stated that he knew Sharon and Lawrence Dyson from the block (10/28 198-99).

On November 29, 2001, at approximately 11:45 pm, Milton, who was in front of 1708 Capitol Avenue, N.E., saw Lawrence and Kimothy park in front of 1704 Capitol Avenue, N.E. (10/28 208). They all spoke briefly and then Lawrence and Kimothy left (10/28 209). Milton next saw Lawrence and Kimothy early in the morning on November 30, 2001. They were arguing with the defendant in front of 1708 Capitol Avenue, N.E. (TR 10/28 213). The area was well lit with a street light across the street (TR 10/28 231). The defendant was wearing all black (TR 10/28 214). There was approximately two feet between the parties (TR 10/28 215). As Lawrence and Kimothy started to walk away, the defendant pulled a gun from his hip and shot Kimothy approximately five times at close range (TR 10/28 217, 219, 230). The gun was black with rubber bands wrapped around the handle. (TR 10/28 235). Milton had seen the defendant with that same gun on previous occasions (TR 10/28 236). Then the defendant turned and chased Lawrence while firing shots (TR 10/28 220). Milton heard Lawrence yell so he knew Lawrence got hit (TR 10/28 220). Milton then left the area immediately (TR 10/28 221). Initially, Milton refused to cooperate with the police (TR 10/28 244). On December 6, 2001, Milton told the police that the defendant killed Kimothy and shot Lawrence. Milton also identified the defendant as the shooter from a photo array (TR 10/28 246).

Early in the morning on November 30, 2001, while Sharon Dyson waited for Lawrence and Kimothy to re-

turn to her apartment at 1723 Capitol Avenue, N.E. she heard two gun shots. She looked out of her window and saw muzzle flash as the defendant, who was dressed in dark clothing and a hat, continued to shoot at someone (TR 10/29 409, 415). She had a clear unobstructed view from her apartment window to 1708 Capitol Avenue, N.E. (TR 10/29 409). Furthermore, the defendant was standing near a street light as he fired the gun (TR 10/29 438). She knew the defendant through her friend, Sheril Taylor, who lived on the same street (TR 10/29 395). In fact, Sharon had seen the defendant sitting in front of 1708 Capitol Avenue, N.E. wearing dark clothing and a hat when she walked back from Nikki's house (TR 10/29 408). On December 5, 2001, she identified the defendant from a photo array as the same person she saw shooting at someone on November 30, 2001.

Sheril Taylor was the defendant's cousin. On November 30, 2001, the defendant was staying with Sheril at 1700 Capitol Avenue, N.E. (TR 10/29 447). The sound of gun shots caused Sheril to look out of her apartment window that night (TR 10/29 449). She saw the defendant, who was wearing all black, shooting a gun as he chased another man (TR 10/29 452-53). There was nothing that blocked the view from her apartment window (TR 10/29 459). On previous occasions Sheril had seen the defendant in possession of a black gun with a "raggedy" handle (TR 10/29 459). She identified the gun recovered in this case as the same gun she had seen in the defendant's possession (TR 10/29 461). She also identified the defendant in court as the same person she saw shooting the gun (TR 10/29 446).

After the shooting, the defendant moved in with James Burroughs at 1719 Capitol Avenue, N.E. (TR 10/29 481). The defendant and James had known each other since 1976. James identified the defendant in

court (TR 10/29 483). On December 7, 2001, James gave the police written consent to search his apartment. (TR 10/29 490). The police recovered a black gun with rubber bands around the handle from a shelf on the back porch (TR 10/29 491). The defendant and his girlfriend were asleep on the sofa in the living room. (TR 10/29 492). Neither the defendant, his girlfriend, nor the gun were in the apartment when James went to sleep that night.

Officer Luciano Morales was employed as a firearms examiner for the Metropolitan Police Department. He examined the pistol, a .380 semi automatic Llama, recovered from James Burroughs' apartment (TR 10/29 533). He also examined the shell casings that were recovered from the scene on November 30, 2001. After test firing the Llama pistol, Officer Morales was able to determine that the shell casings recovered from the crime scene were fired from that pistol because the markings on all the shell casings were similar (TR 10/29 538).

Dr. Jonathan Arden, the Chief Medical Examiner for the District of Columbia, testified that Kimothy Wilson was shot three times: twice in his torso and once in his thigh (TR 10/30 593). Dr. Arden further opined that within reasonable medical certainty Kimothy died as a result of gunshot wounds to his body (TR 10/30 593). He also stated that homicide was the manner of death (TR 10/30 609).

Brad Davidson, a private investigator, testified for the defense. He stated that the distance from Sharon's apartment to 1708 Capitol Avenue, N.E was approximately 122 to 124 feet (TR 10/29 639). He also told the jury that there are some tree branches near Sharon's apartment window that might have obstructed her

view (TR 10/29 642). He also interviewed Sheril Taylor three times prior to trial and she told him that she never witnessed a murder (TR 10/29 645).

ARGUMENT

DEFENDANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL

Defendant now alleges ineffective assistance of counsel. Specifically, defendant claims that his trial attorney, James Williams, did not properly investigate the factual and legal case against him (Motion at 1); failed to inform the defendant that he was not going to call a defense witness (Motion at 1); failed to introduce medical evidence on behalf of the defendant (Motion at 1); did not conduct a proper cross examination of the government's witnesses, including failure to utilize a sworn affidavit of a government witness and neglecting to obtain an order from the court requiring all witnesses to submit urinalysis results (Motion at 1 and 2); did not interview the defendant's family (Motion at 1); and generally failed to provide the defendant with certain discovery (Motion at 2). The defendant also claims his due process rights were violated since both his lawyer and the government's lawyers introduced "extrajudicial statements and/or in court statements that were false" (Motion at 2). Finally, the defendant demands additional discovery and to be furnished a free transcript (Motion at 3-4).

A. LEGAL STANDARD

This court should deny the defendant's motion. In order to prevail on a claim of ineffective assistance of counsel, a defendant must prove: (1) that his counsel's performance was deficient and (2) that his counsel's deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

In Strickland, the Supreme Court established a two part standard for evaluating claims of ineffective assistance of counsel. First the defendant must show that his attorney's errors were so "serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* To meet this standard, the defendant must show that, in light of all the circumstances as they appeared at the time of the conduct, "counsel's representations fell below an objective standard of reasonableness," or "prevailing professional norms." *Id.* at 688, 690; *Nix v. Whiteside*, 475 U.S. 157, 165 (1986); *Watson v. United States*, 536 A.2d. 1056, 1065 (1987) (*en banc*), *cert denied*, 486 U.S. 1010 (1988). In evaluating counsel's performance, the reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy'." *Strickland*, 466 U.S. at 689, quoting *Michel v. Louisiana*, 350 U.S. 91,101 (1955); *accord Darden v. Wainright*, 477 U.S. 168, 186-187 (1986); *Hill v. United States*, 489 A.2d 1078, 1080 (D.C. 1985), *cert denied*, 476 U.S. 1119(1986). *See also Zanders v. United States*, 678 A.2d 556, 569 (D.C. 1996). The Supreme Court cautioned that "[e]ven the best criminal defense attorneys would not defend a particular client the same way." *Strickland*, 466 U.S. at 689 (citation omitted). The Court noted in particular that the reasonableness of counsel's action often depend on "informed strategic choices made by the defendant and on information supplied by the defendant." *Id.* at 691.

Second, even if counsel's representation was deficient, the defendant must affirmatively prove prejudice that is "so serious as to deprive the defendant of a fair

trial, a trial whose result is unreliable." *Id.* at 687, 693. To meet this standard, the defendant must show that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.'" *Hockman v. United States*, *supra*, 517 A.2d at 51, quoting *Strickland*, *supra*, 466 U.S. at 693-694. *See also Young v. United States*, 515 A.2d 1090, 1094 (D.C. 1986): *Townsend v. United States*, 512 A.2d 994,1001 (D.C. 1886), *cert. denied*, 481 U.S. 1052 (1987). A defendant therefore bears a heavy burden if he is to prevail in an argument alleging prejudice. *See e.g.*, *Bruce* v. *United States*, 126 U.S. App. D.C. 336, 339, 379 F.2d 113, 116 (1967); *Carter* v. *United States*, 475 A.2d 1118, 1123 (D.C), *cert. denied*, 469 U.S. 931 (1984).

"Failure to make the required showing of *either* deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland*, 466 U.S. at 700 (emphasis added). *See also Hill v. Lockhart*, 474 U.S. 52, 60 (1985). Consequently, the reviewing court need not even "address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* Thus, the reviewing court need not consider the issue of an attorney's performance if there is a finding that the defendant has not shown prejudice. "If it is easier to dispose of an ineffective assistance claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697. *See United States v. Frost*, 502 A.2d 462, 464 (D.C. 1985), *cert. denied*, 479 U.S. 836 (1986). Moreover, it must be remembered that a "[d]efendant is entitled to a fair trial, but not a perfect one, for there are no perfect trials." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 553 (1984).

Here, for the reasons set forth below, the defendant fails to show that he either suffered constitutional prejudice as a result of any alleged error or that his trial lawyer's performance was professionally unreasonable.

B. TRIAL COUNSEL'S PERFORMANCE WAS NOT DEFICIENT

The defendant seems to claim that his lawyer, James Williams, provided constitutionally deficient representation by not conducting proper cross examination of the government's witnesses, failing to impeach the witnesses with sworn affidavits, and not obtaining a court order mandating urinalysis of all witnesses. The defendant's claims are directly contradicted by the record. In fact, with the exception of Milton Robinson, Mr. Williams impeached several of the government's witnesses with their grand jury testimony, criminal records, and sworn statements made to the police (TR 10/29 283, 310; 10/29 464, 470-471, 475-476). While Milton Robinson was in the same jail as the defendant, he executed an affidavit in which he denied any knowledge concerning the shooting and murder. Apparently this affidavit was executed under duress since the defendant had threatened Milton while they were both in jail. Milton had been shot earlier in the year and believed the shooter was acting on behalf of the defendant. Mr. Williams discovered this information when he interviewed Milton prior to trial. Any attempt to impeach Milton with this "jail house" affidavit certainly would have "opened the door" to these unsavory and prejudicial events (*See* Government's Exhibit 1 at 3). Finally, there was no reason to obtain a court order mandating urinalysis because all of the civilian witnesses admitted to either a history of sale or use of

drugs, some as recent as the day before testifying at trial.

The defendant also alleges that Mr. Williams did not properly investigate the factual and legal evidence in this case. Nothing could be further from the truth. Mr. Williams retained an investigator who visited the neighborhood several times to interview witnesses and measure distances (TR 10/30 642-645), The defendant claims that the representation he received was deficient since his lawyer did not call additional witnesses to testify for the defense, including certain medical testimony. However, the defendant fails to not only identify these witnesses, but to offer any type of proffer regarding their alleged testimony. The same argument applies to the contents of his medical records. The trial record is very clear that Mr. Williams spoke with Alice Morris, but elected not to call her because he believed that she was an unreliable witness and had no knowledge of the shooting (TR 10/30 630). Mr. Williams' affidavit explains that any medical testimony would have only strengthened the government's case since there was no medical reason why the defendant could not run after Lawrence Dyson, and the defendant actually told the police that he ran from the scene (Exhibit 1 at 2).

C. THE DEFENDANT SUFFERED NO PREJUDICE

Even if the defendant could establish that counsel's performance was deficient, the defendant cannot show a reasonable probability that the result of the trial would have been different. The government's evidence in this case was very strong. Four witnesses not only identified the defendant from photo arrays but, also identified him in court as the man who murdered Kimothy Wilson and shot Lawrence Dyson. Furthermore,

three of the witnesses already knew the defendant from the neighborhood.

In addition, there was powerful circumstantial evidence corroborating the eyewitness testimony. Milton Robinson testified that on November 30, 2001, the defendant used a black pistol with a handle held together with rubber bands (TR 10/28 235). The pistol was received into evidence as government's exhibit 23 (TR 10/29 516). Sheril Taylor told the jury that, prior to November 30, 2001, she had seen exhibit 23 in the defendant's possession. The pistol was recovered from James Burroughs' apartment on December 7, 2001 (TR 10/29 491). The defendant was in James' apartment at the time. James also testified that although he did not see the defendant bring the pistol into the apartment, there was no pistol inside the apartment before the defendant arrived (TR 10/29 492). Finally, Officer Luciano Morales testified that the shell casings recovered from the crime scene on November 30, 2001 were fired from exhibit 23 (TR 10/29 538). Thus, given the overwhelming evidence of guilt, the defendant has not established a reasonable probability that he would have been acquitted but for his attorney's alleged deficiencies[12].

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[12] The defendant claims in a conclusory manner that the defense and prosecution knowingly offered false evidence at trial. However, the defendant has provided no evidentiary support for this unsubstantiated claim. Accordingly, it should be summarily rejected. Likewise, the defendant is not entitled to either discovery or a transcript in connection with his §23-110 motion. Rule 6 of the Rules Governing Proceedings Under D.C. Code §23-110 only allow for discovery upon a showing of "good cause". Furthermore, "[i]t is permissible for a trial judge to deny a post-conviction discovery request where the prisoner's claims are 'overly broad and speculative.'" *Brown v. United States*, 726 A.2d 149, 155 (D.C.

D. NO HEARING IS WARRANTED IN THIS CASE

An evidentiary hearing on an ineffective assistance of counsel claim is not required in every case. *Head v. United States*, 626 A.2d 1382, 1385 (D.C. 1993), *cert. denied*, 513 U.S. 854 (1994). The Court of Appeals has recognized that a hearing is not necessary when the motion consists of (1) vague and conclusory allegations, (2) palpably incredible claims, or (3) allegations that would merit no relief even if true, or where the claim can be decided on the existing record. *See Dantzler v. United States*, 696 A.2d 1349, 1356 (D.C. 1997); *Reaves v. United States*, 694 A.2d 52,57 (D.C. 1997); *Head*, 626 A.2d at 1385; *Ready v. United States*, 620 A.2d. 233, 234 (D.C. 1993); *see also Webster v. United States*, 623 A.2d 1198, 1207 (D.C. 1993) (no error denying § 23-110 motion without a hearing where counsel's alleged deficiencies and prejudice are reflected in the trial transcript). This is particularly so where the judge ruling on the motion is the same judge who conducted the trial because "the trial judge, who has seen the defense attorney in action and watched the evidence unfold is in [the best] ... situation ... to determine whether there is any

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1999), citing *Brooks v. United States*, 683 A.2d 1369, 1371 (D.C. 1995). Here, defendant's theory that some one else is responsible for the shooting is not only speculative, but is completely contradicted by the record. Thus, defendant's speculative request should be summarily denied. In addition, an indigent defendant is not entitled to a transcript in connection with a collateral attack absent a showing of particularized need. *Legrand v. United States*, 570 A.2d 786, 792 (D.C. 1990); *see also Lewis v. United States*, 605 F.2d 379, 380 (8th Cir 1979) (per curiam). Here, the defendant's demand for a trial transcript based on the claim that he is poor is not a particularized need and defendant has not established any other particularized need for the transcripts in this case.

appreciable possibility that a hearing could establish ... constitutionally defective representation." *Id.*

For the above stated reasons, the United States has demonstrated that the defendant's allegations are either vague and conclusory, contradicted by the record, or do not merit relief even if true. Defendant's unsubstantiated assertions that counsel's performance was deficient, or that he suffered prejudice as a result of Mr. Williams alleged deficiencies are directly contradicted by the existing record and therefor do not warrant a hearing. *Ready*, 620 A.2d at 234. Accordingly, the defendant's motion should be summarily denied.

CONCLUSION

Judicial scrutiny of trial counsel's performance is "highly deferential" in assessing claims of ineffective assistance of counsel. *Strickland*, 466 U.S. at 698. In order to prevailon this motion the defendant must overcome the "strong presumption that counsel's conduct falls within the wide range of professional assistance." *Kimmelman v. Morrrison*, 477 U.S. 365, 381 (1986). The Unites States submits tha the records and files of this case demonstrate effective assistance of counsel, and certainly do not demonstrate that counsel was constitutionally deficient, or that defendant's case was prejudiced as a result of counsel's representations. Accordingly, defendant's motion should be summarily denied.

Respectfully submitted,

ROSCOE C. HOWARD
United States Attorney for
the District of Columbia

ROBERT OKUN
Assistant U.S. Attorney
Chief, Special Proceedings

/s/ Susan Cushman
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GOVERNMENT'S EXHIBIT 1

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

UNITED STATES OF AMERICA

v.

RAYMOND QUIGLEY

F-7850-02
J. RETCHIN

AFFIDAVIT OF JAMES E. WILLIAMS, ESQ.

At the request of Assistant U.S. Attorney Susan Cushman, Esq., I, James E. Williams, Esq., do hereby state the following regarding allegations raised by my former client, Raymond Quigley in a *pro se* motion filed

pursuant to 23 D.C. Code Section 110. It is my understanding that by filing this motion, Mr. Quigley has implicitly waived any claim of attorney-client privilege.

Alleged Failure to Call a Defense Witness

I believe that Mr. Quigley is referring to Alice Morris, who Mr. Quigley thought would provide impeachment evidence regarding statements made by Sharon Dyson, a government witness. My investigator, Brad Davidson, did interview and subpoena Ms. Morris per Mr. Quigley's request. When she did appear at court for the trial, I interviewed Ms. Morris in the company of my investigator. In both sets of interviews, Ms. Morris denied having any knowledge of the shooting incident or statements made about the incident by Ms. Dyson. Both Mr. Davidson and I were also concerned about Ms. Morris' demeanor. She was clearly addicted to some form of narcotic and was barely coherent.

Furthermore, Ms. Morris had also been subpoenaed by the government. When I asked her why, she initially claimed not to know. With a little prodding, she speculated that it might have had something to do with phone calls made to her by Mr. Quigley. Given that she claimed to have no relevant knowledge and was subject to possibly opening the door for the prosecutor to use her testimony about these phone calls, I decided not to call her as a witness. I did explain this decision and my reasons to Mr. Quigley during the course of the trial.

Alleged Failure to Utilize Medical Evidence

The shooting incident occurred in late November, 2001. Witnesses claimed that the shooter ran after one of the victims. Mr. Quigley suggested to me that his doctor would testify that he was not capable of running due to an injury. Earlier that year, Mr. Quigley had

injured his foot in a work site accident and had been treated by a Dr. Tripathi. Utilizing a release form signed by Mr. Quigley, I wrote to Dr. Tripathi and received from him Mr. Quigley's medical records. The last time Dr. Tripathi had seen Mr. Quigley was in early October, 2001. My recollection of the notes from that visit were that Mr. Quigley required no further treatment. When I spoke to Dr. Tripathi on October 21, 2002, he denied that he was of the opinion that Mr. Quigley would not be capable of running in late November of 2001. In fact, he said he knew of no reason why Mr. Quigley could not run at least for a short distance. Furthermore, in Mr. Quigley's lengthy video taped statement, he made no mention of an injury on the date of the shooting yet did state that after he witnessed "Little Man" shoot the victims he (Quigley) ran away from the scene. Accordingly, I did not feel that the records had any probative value and I explained this to Mr. Quigley.

Alleged Failure to Utilize Affidavit

Mr. Quigley is probably referring to an affidavit signed by Milton Robinson, AKA "Little Man". I had interviewed Mr. Robinson in DC Jail. He confirmed to me that he was a witness to the shooting and that Mr. Quigley, who he knew, was the shooter. He also told me that he (Robinson) had been shot at in December 2001 or January 2002 by someone acting at what he believed to be Mr. Quigley's behest. My impression was that he did truly fear Mr. Quigley and wanted no part in the trial. I shared this information with Mr. Quigley.

At some time thereafter, Mr. Quigley provided to me during a visit at the jail a three or four page typed affidavit signed by Mr. Robinson. Therein, Mr. Robinson made claims of police abuse and that statements he

had made to the police about the shooting were not accurate. Shortly before the trial commenced, I spoke with Mr. Robinson and asked him about the affidavit. He explained to me that he did in fact sign it, but that he did so only after being threatened by Mr. Quigley at the jail. Mr. Robinson promptly disavowed the contents of the affidavit.

I was certain that Mr. Kirshner, the prosecutor, was aware that Mr. Robinson had been shot and that Mr. Robinson believed it was because he was a potential government witness. Accordingly, had I used the affidavit to impeach Mr. Robinson on the stand, it would likely have opened the door to this unsavory explanation as to why Mr. Robinson signed it.

Alleged Failure to Impeach Cheryl Taylor

The first time I met with Mr. Quigley, he informed me that at the time of the shooting he had been staying in the apartment of his cousin, Cheryl Taylor. Mr. Davidson was able to locate and interview Ms. Taylor rather quickly. She confirmed that Raymond was her cousin, and that he had been staying at her apartment at the time of the shooting. She further claimed that she knew nothing about the shooting. Mr. Davidson and I again interviewed Ms. Taylor at her residence. She acknowledged that she had been before the grand jury and asked us to try to persuade Mr. Quigley to plea guilty to a lesser charge. She expressed concern that she knew that several people in the neighborhood were likely to testify against him. I shared this information with Mr. Quigley shortly thereafter.

Ms. Taylor appeared at the courtroom during pretrial hearings and advised Mr. Davidson and I that she was there as a government witness. We then learned that she had seen Mr. Quigley chasing Lawrence Dyson

from her window directly above where the shooting had occurred. She explained that she mislead Mr. Davidson and me because she didn't want Mr. Quigley to know that she had cooperated with the government. That same night, I met with Mr. Quigley at DC Jail and advised him about Ms. Taylor's turnaround. He became irate and told me for the first time that Ms. Taylor was not his cousin, although he admitted that they had referred to each other as cousin in conversations with other people.

On the stand during direct, Ms. Taylor did acknowledge that she had referred to Mr. Quigley as being her cousin. Mr. Kirshner then solicited that she was not a biological cousin to Mr. Quigley. I saw no need to explore this further on cross, and I don't believe that she committed perjury. I don't recall whether I did cross examine her about the prior inconsistent statements she made to Brad Davidson and me. However, I did call Mr. Davidson as a witness and he testified about the earlier inconsistent statements by Ms. Taylor.

I hereby swear and affirm that, the foregoing is true and accurate.

/s/ James E. Williams
James E. Williams

APPENDIX E

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION—FELONY BRANCH

UNITED STATES

v.

RAYMOND QUIGLEY

CRIMINAL NO. F 7850-01
CLOSED CASE
JUDGE RETCHIN

[STAMP: [ILLEGIBLE]
2005 SEP 28 A 9:32]

ORDER
(September 27, 2005)

This matter is before the Court on defendant's Motion To Vacate Or Set Aside Conviction, Request For Discovery And An Evidentiary Hearing, and the government's Opposition To Defendant's Motion To Vacate Or Set Aside Conviction, Request For Discovery And An Evidentiary Hearing. For the reasons set forth below, the defendant's motion is **denied**.

PROCEDURAL HISTORY

On July 31, 2002, the government indicted the defendant, Raymond Quigley, on nine counts relating to a

shooting, which killed Kimothy Wilson and wounded Lawrence Dyson. On November 1, 2002, a jury found the defendant guilty of First Degree Murder and related charges. This Court sentenced the defendant to seventy years in prison on April 11, 2003.

The defendant filed a notice of appeal from his convictions on April 25, 2003. On May 8, 2003, the defendant filed a *pro se* 23-110 motion to vacate sentence based on ineffective assistance of counsel. The defendant, through counsel, filed a supplemental motion to the 23-110 motion on February 10, 2004, which the Court denied. On May 27, 2005, the defendant, through counsel, filed his second 23-110 motion, to which the government filed an opposition on August 29, 2005. The defendant's appeals from his convictions and from the denial of his first 23-110 motion have been stayed pending resolution of this motion. In the instant 23-110 motion, the defendant claims that the government violated its obligation to disclose impeachment evidence relating to one of its witnesses, Milton Robinson.

LEGAL STANDARD

As a preliminary matter, the Court notes that when a defendant files a motion to vacate sentence under D.C. Code § 23-110, there is a presumption that a hearing should be held. However, there is no need for a hearing where (1) the claims are vague and conclusory; (2) the claims are palpably incredible; (3) the assertion would not merit relief even if true; or (4) the motion can be resolved on the available record. *Ready v. United States*, 620 A.2d 233,234 (D.C. 1993). The Court has determined that a hearing is not required because the motions can be resolved on the available record.

ANALYSIS

II. *BRADY/GIGLIO* EVIDENCE

The defendant first argues that the sentence should be vacated or set aside as violative of Due Process because the government did not disclose that one of its witnesses, Mr. Milton Robinson, received promises or acts of leniency in exchange for his testimony. The defendant argues that had such promises been fully disclosed, his attorney could have conducted a more effective cross-examination.

A. Legal Standard

Brady v. Maryland, 373 U.S. 83, 87 (1963), requires that the prosecution disclose exculpatory evidence if it is both favorable and material to the defense, at a sufficient time for the evidence to be used for trial. This disclosure obligation includes evidence that could be used to impeach the credibility of a witness. *Giglio v. United States*, 405 U.S. 150, 154-55 (1972). Failure of a prosecutor to disclose such evidence results in a due process violation only when the undisclosed evidence is "material." *United States v, Bagley*, 473 U.S. 667, 678 (1985). Evidence is "material" "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. In *Kyles v. Whitley*, 514 U.S. 419,434 (1995), the Court stressed that the test for materiality is not whether the defendant would have received a different verdict with the evidence. Rather, a "'reasonable probability' of a different result is [] shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Id.*

B. The defendant was not denied due process because there is no evidence of a Bradv/Giglio violation.

There is no evidence that Mr. Robinson received a benefit concerning the resolution of his own criminal cases in exchange for his testimony against the defendant. The defense asserts that nine days after the shooting in this case, Mr. Robinson provided the police with information identifying the defendant as the shooter. Three days after this identification, the police arrested Mr. Robinson for distribution of heroin ("distribution charge"). The defendant asserts that in exchange for Mr. Robinson's guilty pleas to the distribution offense and a bail reform act violation, the government dismissed a possession with the intent to distribute heroin charge ("PWID charge") on April 11, 2002. The defendant argues that the government's failure to disclose this plea agreement violated the duty to disclose *Bradv/Giglio* evidence.

The defendant speculates that there may have been an undisclosed plea agreement. The "record establishes, however, that there was no plea agreement involving Mr. Robinson's testimony. For instance, during Mr. Robinson's sentencing hearing, the Court asked his attorney about "the terms of the agreement [Mr. Robinson had] with the United States (Robinson Tr. at 10). The attorney responded that if Mr. Robinson pled guilty to distribution and failure to appear in court, the government would dismiss the PWID charge. (Robinson Tr. at 11). No mention is made of a deal between Mr. Robinson and the government in any other case. In addition, the government's opposition references a sworn affidavit, signed by Assistant United States Attorney ("AUSA") Florence Pan, who represented the United States in the prosecution of the defendant. Ms.

Pan states that she and AUSA Glenn Kirschner did not make any promises to Mr. Robinson concerning the disposition of his own criminal cases in connection with his testimony in this case. (Pan Aff ¶ 3). Finally, the government references Mr. Robinson's grand jury transcript in this case where Mr. Robinson denies that his testimony was conditioned upon help from the government. (Quigley Tr. at 3, 4, 35).

As noted above, the defendant does not reference any explicit promise, agreement, or statement to show that the government dismissed Mr. Robinson's PWID charge in exchange for his testimony against the defendant. In short, Mr. Robinson's plea agreement in his own cases had nothing to do with his testimony in the defendant's case. Indeed, Mr. Robinson already had been sentenced on May 30, 2002 when he testified against the defendant, and Mr. Robinson had given a statement to the police inculpating the defendant even before Mr. Robinson was arrested. As the defendant has made no showing that the government failed to disclose *Brady/Giglio* evidence, the Court need not entertain the materiality analysis.[13]

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[13] Indeed, Mr. Robinson's plea in an unrelated case has only marginal relevance. *See United States v. Tse*, 375 F.3d 148, 160, 165 (1st Cir. 2004) (holding that the court did not err in preventing the defendant from impeaching a witness about dismissed charges in an unrelated traffic stop where the record did not reflect that the government dismissed the charges in exchange for witness cooperation); *United States v. Lopez*, 372 F.3d 1207, 1210-11 (10th Cir. 2004) (holding the lower court correctly determined that no *Brady* violation existed because the defendant could not show that any deal existed between the witnesses and the government); *Collier v. Davis*, 301 F.3d 843, 848 (7th Cir. 2002) (finding that no *Brady* violation occurred because the defendant "proffered no evi-

III. INEFFECTIVE ASSISTANCE OF COUNSEL

The defendant alternatively argues that his trial counsel's performance was deficient under prevailing professional norms and that this deficiency prejudiced the defendant's case. Specifically, the defendant alleges that his attorney failed to investigate the criminal record and prepare for the cross-examination of Milton Robinson. The defendant argues that knowledge of Mr. Robinson's criminal record would have revealed the aforementioned plea agreement, thus undermining Mr. Robinson's credibility. The defendant also asserts that an investigation would have revealed that Mr. Robinson was selling drugs in the same vicinity as the shootings, bolstering a theory that Mr. Robinson was the shooter, not the defendant. Therefore, the defendant states that he is entitled to a reversal of his conviction.

1. *Standard of Review*

Under *Strickland v. Washington*, 466 U.S. 668, 686 (1984), the right to counsel guaranteed by the Sixth and Fourteenth Amendments is the right to effective assistance of counsel. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*

In *Strickland*, the Supreme Court established a two-pronged standard for evaluating claims of ineffective assistance of counsel. *Id.* First, the defendant must show that his or her attorney's errors were "so

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dence of an explicit promise, agreement, or statement made to [the witness]").

serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 686. To meet this standard, the defendant "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* at 690. However, judicial scrutiny of trial counsel's actions is highly deferential since no two defense attorneys would try a case the same way. *Id.* at 689.

Second, the defendant must show that counsel's deficiency prejudiced the defense such that it deprived the defendant of a fair trial. *Id.* at 686. To meet this standard, there must be a reasonable probability that, but for counsel's errors, the result would have been different. *Id.* at 695-96. As in the *Brady/Giglio* setting, "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Woodard v. United States*, 719 A.2d 966, 972 (D.C. 1998).

2. ***There is no Sixth Amendment violation because there is no evidence of either deficient performance or prejudice.***

Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland*, 466 U.S. at 700. Here, neither prong is met. As discussed above, no promises were made for the defendant's testimony. Furthermore, Mr. Robinson helped the police identify the defendant three days before his arrest for the distribution charge. Even if defense counsel had questioned Mr. Robinson about the terms of his unrelated plea agreement, the government would have been able to rehabilitate Mr. Robinson with his prior consistent statement to the police. Additionally, in line with the

defense theory that Mr. Robinson, not the defendant, killed Wilson and wounded Dyson, the defendant's counsel did impeach Mr. Robinson with his prior drug conviction near the time of the shooting.

Finally, Mr. Robinson was just one of four witnesses to identify the defendant as the person who killed Wilson and wounded Dyson. In short, the government's evidence against the defendant was very strong. Thus, the defendant has not established a reasonable probability of a different verdict or the existence of undisclosed *Brady/Giglio* evidence.

Based on the foregoing, it is this 27th day of September, 2005, hereby

Ordered that defendant's Motion to Vacate Sentence filed pursuant to D.C. Code §23-110 is **denied.**

So Ordered.

/s/ Judith E. Retchin
Judith E. Retchin
Associate Judge

/signed in chambers/